Petition

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No.

In the Supreme Court of the United States

OCTOBER TERM, 1981

UNITED STATES POSTAL SERVICE
BOARD OF GOVERNORS, PETITIONER

v.

LOUIS H. AIKENS

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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QUESTION PRESENTED

Whether a *prima facie* case of employment discrimination in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.*, was established by a Postal Service employee who showed only that he was black and that he had applied for a promotion for which he possessed the minimum qualifications, and that the Postal Service selected another, non-minority, applicant.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	2
Statute involved	2
Statement	2
Reasons for granting the petition	6
Conclusion	13
Appendix A	1a
Appendix B	2a
Appendix C	10a
Appendix D	15a
Appendix E	17a
Appendix F	41a
Appendix G	43a
Appendix H	49a
Appendix I	60a
Appendix J	61a

TABLE OF AUTHORITIES

Cases:

Davis v. *Weidner*, 596 F. 2d 726	13
Daye v. *Harris*, 655 F. 2d 258	12
Furnco Construction Corp. v. *Waters*, 438 U.S. 567	8, 9, 12
Hagans v. *Andrus*, 651 F. 2d 622, cert. denied, No. 81-41 (Oct. 5, 1981)	7, 8, 12
International Brotherhood of Teamsters v. *United States*, 431 U.S. 324	5, 9
McDonnell Douglas Corp. v. *Green*, 411 U.S. 792	4, 8, 10, 11

Cases—Continued Page

McWilliams v. *Escambia City School Board*, 658 F. 2d 326 12
Olson v. *Philco-Ford*, 531 F. 2d 474 .....7, 8, 12, 13
Page v. *Bolger*, 645 F. 2d 227 13
Powell v. *Syracuse University*, 580 F. 2d 1150, cert. denied, 439 U.S. 984 13
Texas Department of Community Affairs v. *Burdine*, 450 U.S. 248 .....4-5, 6, 7, 9, 11, 12

Statute:

Civil Rights Act of 1964, Title VII, Section 717(a), 42 U.S.C. 2000e-16(a) 2, 3

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No.

UNITED STATES POSTAL SERVICE
BOARD OF GOVERNORS, PETITIONER

v.

LOUIS H. AIKENS

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

The Solicitor General, on behalf of the United States Postal Service Board of Governors, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals on remand from this Court (App. B, *infra*, 2a-9a) is not yet reported. The July 31, 1980 opinion of the court of appeals (App. E, *infra*, 17a-40a), which this Court vacated (No. 80-1737) on June 29, 1981 (App. C, *infra*, 10a-14a) is reported at 642 F.2d 514. The November 20, 1980 memorandum opinion of the court of appeals on denial of the petition for rehearing (App. G, *infra*, 43a-48a), which was also vacated by this Court, is not reported. The opinion of the

district court (App. H, *infra*, 49a-59a) is not reported.

JURISDICTION

The judgment of the court of appeals (App. A, *infra*, 1a) was entered on September 8, 1981. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTE INVOLVED

Section 717(a) of Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e-16(a), provides in pertinent part:

> All personnel actions affecting employees or applicants for employment * * * in executive agencies (other than the General Accounting Office) as defined in section 105 of title 5 (including employees and applicants for employment who are paid from nonappropriated funds), in the United States Postal Service and the Postal Rate Commission, * * * shall be made free from any discrimination based on race, color, religion, sex, or national origin.

STATEMENT

Respondent Louis H. Aikens, a black retired employee of the United States Postal Service, brought this Title VII employment discrimination action in the United States District Court for the District of Columbia on February 18, 1977.[1] Among other things, respondent alleged that the Postal Service had discriminated against him on the basis of race

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[1] Respondent had previously filed an administrative complaint of employment discrimination on January 4, 1974. The Postal Service found the complaint to be without merit after a three-day hearing, and the Appeals Review Board of the United States Civil Service Commission affirmed that decision on January 13, 1977. App. H, *infra*, 50a-51a.

by denying him certain details and promotions, in violation of Section 717(a) of the Civil Rights Act of 1964, 42 U.S.C. 2000e-16(a). Respondent sought relief in the form of retroactive promotions and pay benefits as well as attorneys' fees. The case was tried to the court on January 2-3, 1979, and, on February 26, 1979, the court entered its findings of fact and conclusions of law, holding that respondent had failed to establish a *prima facie* case of racial discrimination. App. H, *infra*, 49a-59a.

Respondent claimed that the Postal Service had discriminated against him because of his race with respect to the awarding of four promotions and details between February 17, 1973 and January 12, 1974 (App. H, *infra*, 51a).[2] The trial court found that respondent was the fifth highest ranking employee in the District of Columbia Post Office in March 1973,[3] and that he had been offered and had declined several promotions and lateral transfers[4] between 1966 and 1974. *Id.* at 52a. The court also found that respondent had failed to produce any evidence to show that he had been treated differently from other employees because of his race. *Id.* at 53a. The court specifically found that "[d]uring the period in question, other blacks as well as whites were promoted or detailed to positions above [Aikens'] posi-

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[2] Although respondent claimed that he had been discriminated against with respect to other job opportunities, those claims were held to be untimely. *Ibid.* See also App. E, *infra*, 19a-20a & nn.1-2.

[3] In 1973, postal jobs were reevaluated and reclassified, with the result that other jobs were ranked higher than that which respondent held. App. H, *infra*, 54a-57a.

[4] Respondent refused all lateral transfers despite the fact that such transfers would have broadened his experience and enhanced his chances for promotion. App. H, *infra*, 53a.

tion," and that "[a]t the present time almost all high level positions are held by blacks." *Ibid.* Further, the court found that respondent had "produced no credible evidence that he was as qualified or more qualified than other individuals who were detailed or promoted" over him, and that he had "produced no evidence of specific acts of discrimination against him." *Id.* at 54a. Thus, the court held that respondent had failed to establish a *prima facie* case of racial discrimination. *Id.* at 59a.

On July 31, 1980, the court of appeals reversed by divided vote (App. E, *infra*, 17a-40a), holding that under *McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792 (1973), a Title VII plaintiff need not show, as part of a *prima facie* case of promotion discrimination, that he was "as qualified or more qualified" than the person actually selected for promotion. App. E, *infra*, 25a. The court held that respondent had established a *prima facie* case simply because he had shown that he was black, and that he had applied for a position for which he was qualified, and was not selected. *Id.* at 24a. Thus, the court of appeals remanded the case to the district court to determine whether the Postal Service had rebutted respondent's *prima facie* case. *Id.* at 28a. Petitions for rehearing were denied on November 20, 1980, at which time the court of appeals filed a memorandum opinion (App. G, *infra*, 43a-48a) clarifying "the meaning to be ascribed to the original opinion of [the] court" (*id.* at 43a).

On April 19, 1981, the Solicitor General, on behalf of the Postal Service, filed a petition for a writ of certiorari, in which it was suggested that the judgment be vacated and the case remanded to the court of appeals for further consideration in light of this Court's decision in *Texas Department of*

Community Affairs v. *Burdine*, 450 U.S. 248 (1981). In its petition, the government argued that the holding of the court of appeals was incorrect because the elements that it identified were not sufficient in that context to show that respondent "was rejected under circumstances which give rise to an inference of unlawful discrimination" (*Texas Department of Community Affairs* v. *Burdine*, *supra*, 450 U.S. at 253; footnote omitted). In the promotion context, where many applicants may be minimally qualified for a single vacancy, there is no logical basis for recognizing a presumption that the employer unlawfully discriminated against the employee whenever the employee shows only that he belongs to a minority group and was not selected for a position for which he met the minimum qualifications. On June 29, 1981, the Court, with two Justices dissenting, granted the government's petition, vacated the judgment, and remanded to the court of appeals for reconsideration in light of *Texas Department of Community Affairs* v. *Burdine* (App. C, *infra*, 10a-14a).

On September 8, 1981, in a *per curiam* opinion, the court of appeals reaffirmed its previous holding that the district court had erred in requiring respondent to show that his qualifications were equal to or better than those of the individuals actually selected for promotion (App. B, *infra*, 2a-9a). The court of appeals explained (*id.* at 6a):

> This is not to suggest that the *prima facie* showing of plaintiff's qualifications is without meaning. The Supreme Court has noted that, as part of a *prima facie* case, the plaintiff must demonstrate that his rejection did not stem from "an absolute or relative lack of qualifications." [*International Brotherhood of Teamsters* v. *United States*, 431 U.S. 324, 358 n.44 (1977)].

> A plaintiff who demonstrates that he possesses the absolute minimum qualifications for a job, therefore, does not necessarily make out a *prima facie* case; if the employer has indicated that certain additional qualifications are necessary or preferred, the plaintiff must demonstrate that he has those qualifications as well.

However, because the court of appeals believed that the district court's findings with respect to respondent's qualifications were not sufficiently clear to permit it to determine in the first instance whether respondent had established a *prima facie* case, the court of appeals remanded the case to the district court for entry of additional findings. App. B, *infra*, 8a-9a.

REASONS FOR GRANTING THE PETITION

On remand from this Court, the court of appeals reaffirmed its earlier holding that a person complaining of promotion discrimination in violation of Title VII of the Civil Rights Act of 1964 may establish a *prima facie* case merely by showing that he belongs to a minority group, that he applied for a position for which he was minimally qualified, and that the position was awarded to another, nonminority, applicant. As we demonstrated in our first petition for a writ of certiorari, the holding of the court of appeals is inconsistent with this Court's decision in *Texas Department of Community Affairs* v. *Burdine*, 450 U.S. 248 (1981), because the elements identified by the court of appeals are insufficient in the context to show that the plaintiff "was rejected under circumstances which give rise to an inference of unlawful discrimination" (*id.* at 253; footnote omitted). In the promotion context, where many applicants may be minimally qualified

for a single vacancy, there is no logical basis for recognizing "a presumption that the employer unlawfully discriminated against the employee" (*ibid.*) whenever an employee shows only that he belongs to a minority group and that he was not selected for a position for which he was minimally qualified. Such a presumption can be created only if the employee shows that his qualifications are at least equal to those of the person selected [5] or if he adduces other proof (which, of course, may be available through discovery) that suggests discrimination. The test embraced by the court of appeals is supported neither by statute nor by case law and is contrary both to common experience and to this Court's prior decisions. If the decision below is allowed to stand, defendants in Title VII cases might well be required to defend a plethora of lawsuits with respect to every promotion decision in which persons belonging to minority groups are among the numerous unsuccessful applicants who possess the basic qualifications.

Moreover, the decision below conflicts with recent decisions of two other courts of appeals. *Hagans* v. *Andrus*, 651 F.2d 622 (9th Cir.), cert. denied, No. 81-41 (Oct. 5, 1981); *Olson* v. *Philco-Ford*, 531 F.2d 474 (10th Cir. 1976). In each of those cases, the plaintiff (who alleged that she had been discriminated against on the basis of sex in violation of Title VII) showed that she was a qualified applicant for a promotion for which a man was selected. Yet

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[5] Indeed, since "the employer has discretion to choose among equally qualified candidates, provided the decision is not based upon unlawful criteria" (*Texas Department of Community Affairs* v. *Burdine*, *supra*, 450 U.S. at 259), a showing that the complainant and the person selected were equally qualified arguably would not in itself create a presumption of a violation.

in *Olson* the court of appeals affirmed a judgment dismissing the complaint at the conclusion of the plaintiff's evidence for failure to prove a *prima facie* case,* and in *Hagans* the court of appeals remanded the case for the district court to determine whether there was sufficient additional evidence to establish a *prima facie* case.

In view of this conflict among the circuits and the importance of the question presented, review by this Court is clearly warranted.

1. This Court first considered the elements of a *prima facie* case under Title VII in *McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792 (1973), in which the Court held that the plaintiff had successfully established a *prima facie* case by showing that he was a member of a class protected by Title VII, that he had applied and was rejected for a job for which he was qualified and for which the employer was seeking applicants, and that the employer thereafter left the position unfilled while continuing to seek applicants with the plaintiff's qualifications. *Id.* at 802. The company's decision to leave the position unfilled, rather than hire a concededly qualified applicant, was contrary to common experience (in the absence of discrimination) and therefore gave rise to an inference of discrimination. Such an inference may be made because, as the Court noted in *Furnco Construction Corp.* v. *Waters*, 438 U.S. 567, 577 (1978), "we know from our experience that more often than not people do not act in a totally arbitrary manner, without any underlying reasons, especially in a business setting."

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* We recognize, however, that the plaintiff's evidence in *Olson* included a statement of the employer's reasons for the decision and an attempt to rebut those reasons as pretextual (see 531 F.2d at 477).

The evidence necessary to establish a *prima facie* case of employment discrimination depends upon the particular context in which the discrimination is alleged to have occurred. See *International Brotherhood of Teamsters* v. *United States*, 431 U.S. 324, 357-358 (1977). In every case, however, the plaintiff must shoulder the burden of adducing "proof of actions taken by the employer from which we infer discriminatory animus because experience has proved that in the absence of any other explanation it is more likely than not that those actions were bottomed on impermissible considerations." *Furnco Construction Corp.* v. *Waters*, *supra*, 438 U.S. at 579-580.

In *Texas Department of Community Affairs* v. *Burdine*, *supra*, the Court reaffirmed the rationale of these cases by emphasizing that a Title VII plaintiff must establish a *prima facie* case, not by invocation of some formalistic test, but by showing that he was rejected "under circumstances which give rise to an inference of unlawful discrimination" (450 U.S. at 253; footnote omitted). The Court further explained that such evidence must be sufficient to "create[] a presumption that the employer unlawfully discriminated against the employee" (*id.* at 254). And, for the first time, the Court specified: "[i]f the trier of fact believes the plaintiff's evidence, and if the employer is silent in the fact of the presumption, the court must enter judgment for the plaintiff because no issue of fact remains in the case" (*ibid.*). An accompanying footnote explained that "[t]he phrase 'prima facie case'" is intended in this context to "denote * * * the establishment of a legally mandatory, rebuttable presumption," rather than merely a "plaintiff's burden of producing enough evidence to permit the trier of fact to infer the fact at issue" (*id.* at 254 n.7).

2. The court below attempted to define the elements of a *prima facie* case in promotion disputes by a mechanical extension of the *McDonnell Douglas* test to the promotion context, rather than by ascertaining whether the elements that it identified were sufficient to create that presumption of discrimination which is the essence of any *prima facie* case of employment discrimination. When judged against the latter standard, the *prima facie* case defined by the court of appeals falls far short of the mark.

The error in this case, which is obvious both in the court of appeals' initial opinions and in its opinion on remand from this Court, is that the court focused only on the qualification prong of the *McDonnell Douglas* test. In its initial opinion, the court of appeals assumed that respondent "met the first, third and fourth elements of the test set forth in *McDonnell Douglas*" because "he is a black man; he sought promotion to higher level positions that became available; and white Post Office employees received the positions" (App. E, *infra*, 21a-22a). The court of appeals therefore concluded that only "the second element of the test, having to do with Aikens' qualifications" (*id.* at 22a) was at issue. On remand from this Court, the court of appeals persisted in this view, stating that "[t]he issue here concerns the second part of the *McDonnell Douglas* test, the question of the plaintiff's qualifications for the positions sought" (App. B, *infra*, 6a). However, it is the fourth, rather than the second, element of the *McDonnell Douglas* test that is at issue here. The Postal Service has never contested the fact that respondent possesses the minimum qualifications for the promotions he sought, and the question of respondent's qualifications has therefore never been at issue in this case. What is at issue, and what the court of appeals ignored, is the

rejection element of the test. Under *Texas Department of Community Affairs* v. *Burdine*, *supra*, the mere fact of rejection is not sufficient by itself to give rise to an inference of discrimination. Respondent must show that his rejection occurred under circumstances that give rise to such an inference.

In this case, respondent did not show—and the court of appeals on remand did not require that respondent show—that he was rejected under circumstances that give rise to an inference of discrimination. In other words, respondent neither showed, nor was required by the court of appeals to show, that he was as qualified or more qualified than those selected,[7] and he produced no evidence of specific acts showing that the Postal Service had otherwise discriminated against him or anyone else. Indeed, the district court specifically found that blacks as well as whites were promoted over respondent and that there was a considerable increase in the number of blacks holding high positions in the Washington Post Office during the relevant time period (App. H, *infra*, 53a).

The Postal Service's selection of one qualified white applicant rather than respondent cannot suffice, by itself, to give rise to an inference of discrimination. In the promotion context, numerous minimally qualified candidates may have applied for a single job. Neither logic nor experience supports the recognition of a presumption of discrimination whenever a quali-

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[7] While a Title VII plaintiff need not show relative qualifications to meet the "qualification" element of the *McDonnell Douglas* test, a showing that he is equally or more qualified than those selected would be a circumstance that could give rise to an inference of discrimination. Numerous other circumstances—such as racially derogatory remarks by a supervisor, the failure generally to promote blacks, and statistical evidence—might also give rise to an inference of discrimination. But no such circumstances are present here.

fied disappointed applicant and the qualified individual selected for promotion belong to different classes in terms of sex, race, religion, or national origin.[8] See, *e.g.*, *Hagans* v. *Andrus*, *supra*, 651 F.2d at 626; *Olson* v. *Philco-Ford*, *supra*, 531 F.2d at 478. But see *McWilliams* v. *Escambia City School Board*, 658 F.2d 326 (5th Cir. 1981). Indeed, there is no reason to assume, in the absence of other evidence,[9] that the employer has based a promotion

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[8] The far-reaching implications of the holding below are illustrated by *Daye* v. *Harris*, 655 F.2d 258 (D.C. Cir. 1981), on which the court below relied in its decision in this case to hold that an unsuccessful white applicant had established a *prima facie* case of discrimination simply because the promotion had been awarded to a black. This application of the holding below was arguably necessary to avoid conflict with the principle that an employer has discretion to choose among equally qualified candidates so long as the choice is not based on impermissible criteria (see page 7 note 5, *supra*); for that principle would be seriously compromised if the employer's choice of one such candidate would in itself constitute a *prima facie* case of discrimination because of that candidate's race (or sex, etc.), while the choice of another candidate would not. The error of the court below rests, however, in its adoption of a standard that transforms every promotion decision involving a choice among qualified candidates who differ in race, sex, religion, or national origin into an automatic *prima facie* showing of unlawful discrimination.

[9] Such evidence, which is generally available through discovery, could consist, for example, of evidence of the applicant's comparative qualifications, statistical or other evidence of the employer's practices, or some combination of such showings. Also pertinent, for example, would be whether the employer has been able to articulate a non-discriminatory reason for the selection, in response to a discovery request. See *Furnco Construction Corp.* v. *Waters*, *supra*, 438 U.S. at 576-580. As the Court stated in *Texas Department of Community Affairs* v. *Burdine*, *supra*, 450 U.S. at 253, the burden of establishing a *prima facie* case should not be onerous—for those who have a *prima facie* case.

decision on an impermissible consideration simply because he has chosen among qualified persons of different races, sexes, religions or national origins. As the Tenth Circuit aptly stated, "to make a *prima facie* case * * * something more is needed than proof that a qualified male was chosen over a qualified female. If nothing more is needed, we have indeed opened Pandora's box." *Olson* v. *Philco-Ford*, *supra*, 531 F.2d at 478. In this case, the court of appeals held that respondent need not show anything more.

In light of the conflict among the circuits and the importance and recurring nature of the question presented,[10] review by the Court is warranted at this time.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted.

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DECEMBER 1981

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[10] See, *e.g.*, *Page* v. *Bolger*, 645 F.2d 227 (4th Cir. 1981); *Daye* v. *Harris*, *supra*; *Davis* v. *Weidner*, 596 F.2d 726 (7th Cir. 1979); *Powell* v. *Syracuse University*, 580 F.2d 1150 (2d Cir.), cert. denied, 439 U.S. 984 (1978).

Appendix

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT
Washington, D.C. 20001

George A. Fisher
Clerk

September 8, 1981

RE: Appeal No. 79-1574, Louis H. Aikens v. United States Postal Service Board of Governors

Dear Sir:

Enclosed herewith are three (3) copies of the opinion in the above entitled case.

Please note that the judgment has been entered on the same date as the opinion and is for mandate purposes only.

Sincerely,

WAYNE A. SANDHOLTZ
Opinions Clerk

Enclosure

DISTRIBUTION:

L. Harold Aikens, Jr.
Stephen C. Alpern, Jr.
U.S. Attorney

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 79-1574

LOUIS H. AIKENS, APPELLANT

v.

UNITED STATES POSTAL SERVICE BOARD OF GOVERNORS, APPELLEES

On Remand

Filed 8 September 1981

Before: WILKEY, WALD, AND EDWARDS, *Circuit Judges.*

Opinion *Per Curiam.*

Per Curiam: This case is before us again because the Supreme Court vacated and remanded for reconsideration our decision that appellant had made out a prima facie case of racial discrimination in employment.[1] Applying the legal standards set forth, we reverse the district court's grant of summary judgment to appellee and remand for further proceedings.

I. HISTORY OF THE CASE

Appellant Louis Aikens brought this Title VII action alleging that appellee United States Postal

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[1] *Aikens* v. *United States Postal Serv.*, 642 F.2d 514 (D.C. Cir. 1980), *rev'd*, 49 U.S.L.W. 3967 (30 June 1981).

Service failed to promote him on account of his race. The district court granted summary judgment for the Postal Service because appellant failed to make out a prima facie case of racial discrimination. This court reversed on two grounds. First, the majority rejected the district court's legal conclusion that appellant's claim failed because he did not "prove that he was as qualified or more qualified than the individuals who were promoted or detailed." [2] Reviewing the evidence in the record, the majority determined that appellant had established a prima facie case of racial discrimination under the test set forth in *McDonnell Douglas Corp.* v. *Green.*[3] Second, we found that the district judge had erred in holding that it was "critical" for appellant to offer "proof of discriminatory motive on the part of defendant." [4] Judge Wilkey dissented from the majority's finding that appellant had met his burden of establishing a prima facie case.

The Supreme Court granted the Postal Service's certiorari petition, vacated the judgment, and remanded the case back to this court for further consideration in light of *Texas Department of Community Affairs* v. *Burdine.*[5] In *Burdine,* which dealt primarily with allocation of the burden of proof where the plaintiff has proved a prima facie case of discrimination, the Court set forth the basic requirements for establishing a prima facie case. *Burdine* in no way alters our conclusion that the district court erred in requiring appellant to prove discriminatory

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[2] *Aikens* v. *Bolger,* No. 77-0303, Conclusion of Law ¶ 8 (D.D.C. 26 Feb. 1979), *reprinted in* Appendix (App.) at 24.

[3] 411 U.S. 792 (1972).

[4] Conclusion of Law ¶ 7, *reprinted in* App. at 24.

[5] 101 S.Ct. 1089 (1981).

motive on the part of appellee. After considering *Burdine's* elaboration of the *McDonnell Douglas* test, however, we remand to the district court for consideration of whether appellant has proved a prima facie case of racial discrimination.

II. Analysis

In *Burdine* the Supreme Court summarized the three stages in a Title VII case alleging discriminatory treatment:

> First, the plaintiff has the burden of proving by the preponderance of the evidence a prima facie case of discrimination. Second, if the plaintiff succeeds in proving the prima facie case, the burden shifts to the defendant "to articulate some legitimate, non-discriminatory reason for the employee's rejection." Third, should the defendant carry this burden, the plaintiff must then have an opportunity to prove by a preponderance of the evidence that the legitimate reasons offered by the defendant were not its true reasons, but were a pretext for discrimination.[6]

This case deals with the first stage, where the plaintiff must prove a prima facie case, *i.e.*, "the establishment of a legally mandatory, rebuttable presumption" that the employer discriminated against him.[7] In *McDonnell Douglas* the Court stated that a plaintiff may establish a prima facie case by showing

> (i) that he belongs to a racial minority; (ii) that he applied and was qualified for a job for

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[6] *Id.* at 1093 (citing *McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792, 802, 804 (1973)).

[7] *Id.* at 1094 n.7.

which the employer was seeking applicants; (iii) that, despite his qualifications, he was rejected; and (iv) that, after his rejection, the position remained open and the employer continued to seek applicants from persons of complainant's qualifications.[8]

The Court elaborated on this test in *Burdine*:

> The burden of establishing a prima facie case of disparate treatment is not onerous. The plaintiff must prove by a preponderance of the evidence that she applied for an available position, for which she was qualified, but was rejected under circumstances which give rise to an inference of unlawful discrimination. The prima facie case serves an important function in the litigation: it eliminates the most common nondiscriminatory reasons for the plaintiff's rejection. See *Teamsters* v. *United States*, 431 U.S. 324, 358 & n.44 (1977). As the Court explained in *Furnco Construction Co.* v. *Waters*, 438 U.S. 567, 577 (1978), the prima facie case "raises an inference of discrimination only because we presume these acts, if otherwise unexplained, are more likely than not based on the consideration of impermissible factors." Establishment of the prima facie case in effect creates a presumption that the employer unlawfully discriminated against the employee. If the trier of fact believes the plaintiff's evidence, and if the employer is silent in the face of the presumption, the court must enter judgment for the plaintiff because no issue of fact remains in the case.[9]

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[8] 411 U.S. at 802.

[9] 101 S.Ct. at 1094 (footnotes omitted).

The issue here concerns the second part of the *McDonnell Douglas* test, the question of the plaintiff's qualifications for the positions sought. The district court found "that plaintiff has failed to present a *prima facie* case of racial discrimination in that plaintiff failed to prove that he was as qualified or more qualified than the individuals who were promoted or detailed." [10] In light of *McDonnell Douglas* and *Burdine*, this was plain error. The Supreme Court has never stated that establishment of a prima facie case must include proof that plaintiff was "as qualified or more qualified" than the persons hired or promoted. Such a demonstration may be essential at the third stage of the litigation, where the plaintiff has the ultimate burden of persuading the factfinder that the Government has offered no true nondiscriminatory reasons for its action. But this standard is not applicable to the prima facie case.

This is not to suggest that the required prima facie showing of plaintiff's qualifications is without meaning. The Supreme Court has noted that, as part of a prima facie case, the plaintiff must demonstrate that his rejection did not stem from "an absolute or relative lack of qualifications." [11] A plaintiff who demonstrates that he possesses the absolute minimum qualifications for a job, therefore, does not necessarily make out a prima facie case; if the employer has indicated that certain additional qualifications are necessary or preferred, the plaintiff must demonstrate that he has those qualifications as well.

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[10] Conclusion of Law ¶ 7, *reprinted in* App. at 24.

[11] *International Bhd. of Teamsters* v. *United States*, 431 U.S. 324, 358 n.44 (1977).

If the plaintiff succeeds in presenting a prima facie case, the burden of *production* shifts to the employer. *Burdine* makes clear that the employer need only articulate (not prove) a legitimate, nondiscriminatory reason for rejecting the plaintiff. The opinion in *Burdine* also states that the employer's reason must be stated "with sufficient clarity so that the plaintiff will have a full and fair opportunity to demonstrate pretext"; [12] often the employer may meet this burden simply by stating that the applicant hired or promoted was more qualified in a particular respect than the plaintiff. The second stage of the *McDonnell Douglas* formulation allows the employer quickly to "frame the factual issue" on which the plaintiff must prevail in order to prove discrimination.[13] To succeed in his or her claim, the plaintiff must prove at the third stage that the employer's proferred nondiscriminatory reason for its action was merely a pretext for actual discrimination. This burden of proving discrimination never shifts, but "remains at all time with the plaintiff." [14]

We recognize that Title VII cases involving professional and managerial positions raise uniquely difficult issues not found in cases involving lower-level jobs. Most abilities of a successful manager—especially the ability to assume responsibility for motivating and directing other employees—are intangible, and each applicant could bring to the position an enormous variety of life experiences that are relevant. The three stages of the *McDonnell Douglas* framework are flexible enough, we believe, to facili-

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[12] 101 S.Ct. at 1095.

[13] *Id.*

[14] *Id.* at 1093.

tate a fair and efficient resolution of such difficult issues. At the prima facie stage, as noted above, the plaintiff may be required to go beyond a showing of minimum qualifications to demonstrate that he possesses whatever qualifications or background experiences the employer has indicated are important. At the second stage, the employer must indicate which qualifications or background experiences formed the basis of his hiring or promotion decision; then, at the final stage, the plaintiff would have to show his superiority in those areas in order to prove discrimination. As the Court reiterated in *Burdine*, Title VII does not affect the employer's "discretion to choose among equally qualified candidates, provided the decision is not based upon unlawful criteria." [15]

III. Conclusion

The district court concluded that appellant did not prove that he was as qualified or more qualified than the successful applicants. Not only was this an erroneous legal standard for the prima facie case stage of a Title VII case, but the court did not make findings on appellant's qualifications clear enough to permit us to determine if a prima facie case was established. Consequently, we must remand to the court for determination of this issue. If the court finds that appellant has demonstrated that his rejection did not result from "an absolute or relative lack of qualifications," [16] the Government must then articulate a legitimate nondiscriminatory reason for its rejection of appellant. If such a reason is articu-

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[15] *Id.* at 1097.

[16] *International Bhd. of Teamsters* v. *United States*, 431 U.S. 324, 358 n.44 (1977).

lated, appellant bears the ultimate burden of proving that the Government's justification is a mere pretext for discrimination. For the reasons stated in our original decision, the court should not require direct proof of discriminatory motive on the part of the Postal Service.[17] The district court's grant of summary judgment is hereby

Vacated and Remanded.

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[17] *See* 642 F.2d at 519-20; *id.* at 521 (Wilkey, J., dissenting).

APPENDIX C

SUPREME COURT OF THE UNITED STATES

No. 80-1737

UNITED STATES POSTAL SERVICE BOARD OF GOVERNORS

v.

LOUIS H. AIKENS

On Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

Decided June 29, 1981

The petition for a writ of certiorari is granted. The judgment is vacated and the case is remanded to the United States Court of Appeals for the District of Columbia Circuit for further consideration in light of *Texas Department of Community Affairs* v. *Burdine*, 450 U.S. —— (1981).

JUSTICE MARSHALL, with whom JUSTICE BRENNAN joins, dissenting.

At the behest of the Government, the Court today summarily vacates a judgment of the Court of Appeals for the District of Columbia Circuit and remands the case to that court for reconsideration in light of our decision earlier this Term in *Texas Department of Community Affairs* v. *Burdine*, —— U.S. —— (1981). Because I regard this disposition as wholly inappropriate and unnecessary, I dissent.

Respondent Aikens is a retired Negro employee of petitioner United States Postal Service. He filed this suit alleging that petitioner had violated Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.*, by discriminating against him because of his

race with respect to the awarding of promotions and work details. The District Court, in dismissing the action, concluded that respondent had failed to establish a prima facie case of discrimination because he had not shown "that he was as qualified as or more qualified than the individuals who were promoted." —— F. Supp. ——, —— (D.C. 1979). The Court of Appeals reversed, concluding that the District Court's ruling was "[p]lainly . . . a misstatement of applicable law." —— F.2d ——, —— (1980). The panel noted that even the Government, petitioner here, had conceded that the District Court had mischaracterized the showing necessary to establish a prima facie case under Title VII. *Ibid.* The court concluded that this Court's controlling decision in *McDonnell Douglas* v. *Green*, 411 U.S. 792 (1973), required that a Title VII plaintiffs as part of his prima facie case, show only that "he applied and was qualified for a job for which the employer was seeking applicants." *Id.*, at 802.[1] Accordingly, the case

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[1] As set forth in *McDonnell Douglas* v. *Green*, 411 U.S. 792 (1973), a Title VII plaintiff establishes a prima facie case of discrimination when he shows

"(i) that he belongs to a racial minority; (ii) that he applied and was qualified for a job for which the employer was seeking applicants; (iii) that, despite his qualifications, he was rejected, and (iv) that after his rejection, the position remained open and the employer continued to seek applicants from persons of complainant's qualifications." *Id.*, at 802.

There is no dispute in this case that the other elements of a Title VII prima facie case are satisfied. As the Court of Appeals observed:

"On the record in this case, it is clear that Aikens met the first, third and fourth elements of the test set forth in *McDonnell Douglas*: he is a black man, he sought promotion to

was remanded to the District Court for further proceedings under the appropriate standard.

The Government, ignoring its earlier concession of error by the District Court, now asks this Court to vacate the judgment of the Court of Appeals on the ground that it is "inconsistent" with this Court's decision in *Texas Department of Community Affairs* v. *Burdine, supra.* While the majority without explanation today accepts this suggestion, I find it untenable. Simply put, our decision in *Texas Department of Community Affairs* has almost nothing to do with the issue raised in this case. That decision involved "the narrow question . . . whether, *after the plaintiff has proved a prima facie case of discriminatory treatment*, the burden shifts to the [employer] to persuade the court that by a preponderance of the evidence that legitimate, nondiscriminatory reasons for the challenged employment action existed." —— U.S. at —— (emphasis added). The exclusive focus of the case was on the sort of showing Title VII defendant must make to rebut a prima facie case of discrimination. The dispute here, in contrast, involves only the threshold issue whether a Title VII plaintiff, *in order to establish a prima facie case of discrimination*, must show that he was qualified for the sought after position or, as the District Court ruled and the Government now suggests, that he was as qualified as or more qualified than the person selected by the employer. In resolving this entirely different question, the Court of Appeals correctly turned to our decision

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higher level positions that became available, and white Post Office employees received the positions." —— F.2d ——.

Thus, the only issue raised here is the nature of the second requirement of a prima facie case: that the complainant "was qualified for a job for which the employer was seeking applicants." *McDonnell Douglas, supra,* at 802.

in *McDonnell Douglas* v. *Green*, *supra*, and concluded that the decision of the District Court was "plainly at odds" with the express language of that decision.

This conclusion, in my view, is unassailable. *McDonnell Douglas* requires a Title VII plaintiff as part of his prima facie case to show that he "was qualified for a job for which the employer was seeking applicants," 411 U.S. at 802. Nothing in that decision or subsequent ones by this Court supports the District Court's view, now embraced by the Government, that the plaintiff at this threshold stage must also show that he was as or more qualified than the selected applicant. Indeed, our decision in *Texas Department of Community Affairs* expressly reaffirmed the *McDonnell Douglas* formulation of the prima facie case, —— U.S., at ——, n.6, and specifically noted that the respondent in that case had established this segment of the prima facie case by simply showing that she was "a qualified woman who sought an available position." *Ibid.* See also *Furnco Construction Corp.* v. *Waters*, 438 U.S. 567, 575-576 (1978).

In asserting that our decision in *Texas Department of Community Affairs* may have altered the *McDonnell Douglas* test of a prima facie case, the Government relies on statement in *Texas Department of Community Affairs* that a prima facie case is established when an applicant is "rejected under circumstances which give rise to an inference of unlawful discrimination." —— U.S., at ——. In the promotion context, the Government asserts, such an inference of unlawful conduct does not arise simply because a qualified applicant is rejected for a job. Other persons may have also applied for the promotion, and the rejection of the applicant may merely indicate that a *more* qualified applicant was selected. Thus, in the Government's view, the unsuccessful ap-

plicant for a promotion must disprove this possibility in order to establish a prima facie case of discrimination.

The Government's view represents one potential way to structure the burdens of proof in a Title VII case,[2] but it has never been embraced by this Court. If the Court now feels that the issue requires reexamination, it should grant the Government's petition for certiorari and hear oral argument in the case. Instead, the Court remands without opinion to the Court of Appeals for reconsideration in light of ambiguous dictum in an opinion dealing with an entirely distinct issue. I am at a loss to understand this disposition, as I suspect the Court of Appeals will be. Perhaps it reflects the pressures of the end of the Term, or an excessive deference to the views of the Solicitor General, or a desire for an easy, temporary solution to a potentially troublesome issue. But these reasons simply cannot justify today's disposition, which rather than clarifying the law, needlessly obscures it. Such action is contrary to our judicial duty, and I therefore dissent.

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[2] In my view, the fact that the chosen employee was *more* qualified than other qualified applicants for the job is the sort of justification that the *employer* is entitled to use to rebut the prima facie case. An applicant who has satisfied the objective qualifications established by the employer for promotion may have no way of knowing what additional considerations the employer relied on in selecting a particular person among the pool of qualified applicants. This information is uniquely within the control of the employer, and thus it places an unfair burden on the plaintiff to require him, as part of his prima facie case, to guess what additional considerations the employer might have relied on and to prove that even under these considerations he was at least as qualified as the selected applicant.

APPENDIX D

No. 79-1574

LOUIS H. AIKENS, APPELLANT

v.

UNITED STATES POSTAL SERVICE
BOARD OF GOVERNORS, APPELLEES

Appeal from the United States District Court
for the District of Columbia

September Term, 1979

Filed July 31, 1980

Before: WILKEY, WALD and EDWARDS, *Circuit Judges.*

JUDGMENT

This cause came on to be heard on the record on appeal from the United States District Court for the District of Columbia, and was argued by counsel.

On consideration thereof it is ordered and adjudged by this Court that the judgment ———— of the District Court appealed from in this cause is hereby reversed and the case is remanded for further pro-

ceedings, consistent with the opinion of this Court filed herein this date.

Per Curiam
For the Court

/s/ _____
GEORGE A. FISHER
Clerk

Date: July 31, 1980

Opinion for the Court filed by Circuit Judge Edwards.

Judge Wilkey dissents and will file a statement of separate views at a later date.

APPENDIX E

No. 79-1574

LOUIS H. AIKENS, APPELLANT

v.

UNITED STATES POSTAL SERVICE
BOARD OF GOVERNORS, APPELLEES

Appeal from the United States District Court
for the District of Columbia
(Civil Action No. 77-0303)

Argued April 28, 1980

Decided July 31, 1980

Before: WILKEY, WALD and EDWARDS, *Circuit Judges.*

Opinion for the Court filed by *Circuit Judge* EDWARDS.

Judge WILKEY dissents and will file a statement of separate views at a later date.

EDWARDS, *Circuit Judge:* Plaintiff-appellant, Louis H. Aikens, instituted this action under Title VII of the Civil Rights Act of 1964, 78 Stat. 241, 253, as amended by the Equal Employment Opportunity Act of 1972, 42 U.S.C. § 2000e *et seq.*, seeking redress of alleged discrimination on the basis of race in his

employment with the United States Postal Service. Aikens, who is now retired from the Postal Service, requested relief in the form of retroactive promotions, commensurate retroactive pay benefits, and attorneys' fees. The District Court found that Aikens had failed to make out a prima facie case of racial discrimination under Title VII and ordered that the action be dismissed with prejudice. Aikens now appeals from the District Court decision. For the reasons outlined below, we hereby reverse the decision of the District Court and remand the matter for further proceedings consistent with our judgment in the case.

I.

Aikens is a black man who began his employment with the Post Office in Washington, D.C. in 1937. He was promoted to his first supervisory position in 1952; subsequently, between 1952 and 1960, Aikens held various jobs at the level of foreman. From 1960 to 1966, he received six promotions that raised him from the foreman level (ranked PFS-7) to the level of Assistant Director, Operations Division for Transit Mails (PFS-15). In 1974, Aikens was upgraded twice, once by virtue of a promotion and once pursuant to a "detail" (temporary assignment). Between 1966 and 1974, however, Aikens was neither detailed nor promoted above his Assistant Director position. His failure to be promoted during this latter period forms the basis of this Title VII suit.

Under applicable Postal Service procedures, an employee who desires consideration for supervisory promotions is required to indicate his job preferences on a Form 1717. Following that procedure, during the entire period from 1966 through 1973, Aikens had on file the appropriate Form 1717 seeking considera-

tion for promotion to any Post Office position ranked above his PFS-15 job. Between 1966 and 1973, there were only four positions in the Washington, D.C. Post Office that were ranked above PFS-15. During that period, several white employees, all with less seniority than Aikens, were promoted above him. After the Job Evaluation Program in 1973, Aikens' job was rated at grade PES-20; however, following the implementation of the Job Evaluation Program, several additional positions were rated above Aikens' job and several junior white employees received details or promotions above Aikens.

Aikens filed an Equal Employment Opportunity complaint with the Postal Service on January 4, 1974. An existing Civil Service Regulation, 5 C.F.R. § 713.214 (1974), required that complaints be filed within thirty days of the alleged discriminatory action. Under this statute of limitations standard, Aikens' complaint was timely only as to four positions for which promotions or details had occurred within thirty days of the complaint; the four positions in question were Mail Processing Officer, Acting Mail Processing Representative, Director, Operations Division, and Customer Services Representative.[1]

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[1] Alleging that the Postal Service's failure to promote him during the entire eight year period, from 1966 until 1974, constituted racial discrimination of a continuing nature, Aikens argues that administrative and judicial review should not have been limited to the four positions for which he filed a timely complaint. In general, plaintiffs who allege continuing violations can file charges at any time during which the continuing violation has taken place. *E.g., Rich* v. *Martin Marietta Corp.*, 522 F.2d 333, 348-49 n.15 (10th Cir. 1975). This theory is inapposite in this case, however, because there is no indication that Aikens was adversely affected by an employment policy or practice that consistently operated to hold him, or blacks as a

Accordingly, administrative and judicial review of Aikens' employment discrimination claim was properly focused on Aikens' failure to be promoted to these four positions.[2]

Following an administrative review, the Postal Service concluded that the evidence of record did not support Aikens' allegation of racial discrimination. This judgment was affirmed by the Appeals Review Board of the Civil Service Commission. Aikens then filed his Title VII complaint in the District Court, which held a trial *de novo* on his claim of employment discrimination. Aikens here appeals a judgment rendered in favor of the Postal Service.

II.

In *McDonnell Douglas* v. *Green*, 411 U.S. 792 (1973), the Supreme Court articulated the standard

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class, in the lower echelons of employment. *Macklin* v. *Spector Freight Systems, Inc.*, 478 F.2d 979 (D.C. Cir. 1973); *Rich* v. *Martin Marietta Corp.*, 522 F.2d at 348. *But see, Cedeck* v. *Hamiltonian Fed. Sav. & Loan Ass'n*, 551 F.2d 1137 (8th Cir. 1977). Therefore, we consider here only the four positions for which Aikens filed a timely complaint with the Postal Service.

[2] The findings of fact in the District Court opinion also focus on Aikens' failure to be promoted to the position of Postmaster. In 1972, Aikens was one of four candidates for the position of Postmaster. Because of the pending Job Evaluation Program and a potential postal reorganization, officials delayed sending the four names to the selection board. The new job classifications established by the Job Evaluation Program made Aikens ineligible for the Postmaster position. After a new selection procedure, a black man became Postmaster of Washington, D.C. in January 1974. In light of the arguments advanced by counsel during the oral arguments in this case, we do not consider Aikens' claims of racial discrimination related to the Postmaster position.

that must be met in order for individual complainants to make out a prima facie case of discrimination under Title VII:

> The complainant in a Title VII trial must carry the initial burden under the statute of establishing a prima facie case of racial discrimination. This may be done by showing (i) that he belongs to a racial minority; (ii) that he applied and was qualified for a job for which the employer was seeking applicants; (iii) that, despite his qualifications, he was rejected; and (iv) that after his rejection, the position remained open and the employer continued to seek applicants from persons of complainant's qualifications.

411 U.S. at 802. The Court recognized that the varying factual situations seen in Title VII cases require the application of a flexible formulation for this prima facie proof. *Id.* at 802 n.13. In essence, *McDonnell Douglas* requires an individual bringing suit under Title VII to demonstrate that the alleged discrimination did not result from a lack of qualifications or the absence of a vacancy in the job sought. *International Brotherhood of Teamsters* v. *United States*, 431 U.S. 324, 358 n.44 (1977). Thus, it has been held that the *McDonnell Douglas* test, adopted to fit the factual circumstances of the case, applies in individual actions involving charges of race discrimination in promotion decisions. *President* v. *Vance*, No. 78-1226, slip op. at 24 n.78 (D.C. Cir. April 25, 1980); *Rich* v. *Martin Marietta Corp.*, 522 F.2d 333, 346-47 (10th Cir. 1975).

On the record in this case, it is clear that Aikens met the first, third and fourth elements of the test set forth in *McDonnell Douglas:* he is a black man;

he sought promotion to higher level positions that became available; and white Post Office employees received the positions. Therefore, it is the second element of the test, having to do with Aikens' qualifications to perform the jobs here in question, that must be addressed in our consideration of this appeal.[3]

III.

Upon review of the evidence submitted to the District Court, we are convinced that Aikens offered ample evidence, which was not contested, to demonstrate his qualifications to perform the work in issue. To begin with, we note that the District Court made no finding that Aikens was not qualified for the positions in dispute. Moreover, Aikens' own record of accomplishments attests to his qualifications. He is highly educated, having earned a Master's degree and completed several years of course work towards a Ph.D. Aikens had almost forty years of experience with the Post Office, during which time he held a number of different supervisory positions. Nothing indicates that his performance was ever less than satisfactory. Indeed, his work record indicates that he participated in training and development courses and seminars designed to enhance his performance on the job.

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[3] We should emphasize that the question here, involving Aikens' "qualifications," concerns only the evidence necessary to make out a prima facie case. A person may be qualified to perform a job, and thus satisfy the requirements for a prima facie case under *McDonnell Douglas, supra,* and still ultimately fail on his claim of discrimination under Title VII. See Section V, *infra.* Nothing in this opinion is intended to suggest otherwise.

Another indication of Aikens' qualifications was his nomination by Post Office officials for several promotions. During the selection process that occurred before the 1973 Job Evaluation Program, the Regional Office made Aikens one of the candidates for the Postmaster position. Stipulation 35. In addition, when two other positions (including one of those at issue in this case) were filled in 1972, Aikens was the second choice of the Promotion Advisory Board. Stipulation 25-26. If both the Regional Office and the Promotion Advisory Board believed him to be qualified for these higher positions, it seems unlikely that he would not be qualified for the four positions in question here.

The promotions that Aikens received in 1974 also attest to his qualifications to perform work at higher levels of employment. Only a few days after Aikens had filed his employment discrimination complaint in January 1974, he received a promotion to Area Logistics Manager, ranked at job grade PES-21. Shortly thereafter, he was detailed to the position of Assistant Manager of Distribution, PES-24. The very fact of an employee's ultimate promotion has been found to demonstrate that the employee is qualified for promotion. *Sweeney* v. *Board of Trustees of Keene State College*, 569 F.2d 169, 178 n.18 (1st Cir.), *vacated and remanded on other grounds*, 439 U.S. 24 (1978), *judgment of district court affirmed following remand*, 604 F.2d 106 (1st Cir. 1979).

In its factual finding number 14, the District Court focused on Aikens' unwillingness to accept lateral transfers and noted that promotion depended in part on experience previously attained in various management positions. *See also* findings 10, 13. In so finding, the District Court opinion suggests both that the

experience Aikens sacrificed, by declining lateral transfers, was a requirement for promotion and that the lack of that experience reflected adversely on his ability to perform the jobs at issue here. We note, however, that the Postal Service adduced no evidence to demonstrate that experience in the particular lateral positions that Aikens declined was either a qualification required for promotion or related to the positions he sought. Without such evidence of job relatedness, we cannot conclude that Aikens' refusal to accept lateral transfers made him unqualified for promotion. *Cf. Albemarle Paper Co.* v. *Moody*, 422 U.S. 405 (1975); *Griggs* v. *Duke Power Co.*, 401 U.S. 424 (1971).

Because we find that the clear weight of the evidence indicates that Aikens was qualified to perform the jobs in question, and because the District Court did not find otherwise, we must conclude that Aikens made out a prima facie case of race discrimination pursuant to the test set forth in *McDonnell Douglas*, *supra*.[4]

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[4] Two additional points require comment. Evidently relying on affidavits offered by the Postal Service, the court below found that Aikens had informed supervisors that he was interested in only two specific positions. Finding of fact number 11. This finding was offered as if to suggest that, whether or not qualified, Aikens had no interest in the disputed jobs. However, even assuming that the affidavits were properly admissible (a question which we need not address), it is clear that they were not dispositive of Aikens' claim. Aikens had filed Form 1717 to demonstrate his interest in *all* Postal Service positions higher than his own, and he had done nothing to withdraw those forms. The Postal Service had articulated no policy that foreclosed an employee from promotion to a position for which a current Form 1717 was on file, merely on the strength of his expressed interest in promotion to other

IV.

Even if we were to find that the evidence with respect to Aikens' qualifications was unclear, we would still be required to reverse and remand this case because of certain erroneous conclusions of law in the opinion of the District Court.

In conclusion of law number 8, the District Court opinion indicates that plaintiff's claim cannot succeed because he "failed to prove that he was *as qualified or more qualified* than the individuals who were promoted or detailed" (emphasis added). Plainly, this is a misstatement of applicable law and counsel for appellee conceded as much during the oral arguments in this case on appeal. As noted above, the Supreme Court in *McDonnell Douglas, supra*, has made it clear that, in order to make out a prima facie case with respect to the qualification element, an individual complainant in a Title VII suit need only prove that he or she "was qualified for a job for which the employer was seeking applicants." 411 U.S. at 802. Nothing in *McDonnell Douglas, supra*, requires a plaintiff seeking to make out a prima facie case to

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positions. Because Aikens was not offered any of the four positions, he never had the opportunity to demonstrate his disinterest effectively by declining the positions. Furthermore, we cannot accept the government's contention that a plaintiff in a Title VII suit, as a part of his demonstration of qualifications, is required to describe the positions in dispute. As the Supreme Court suggested in *Albemarle Paper Co.* v. *Moody*, 422 U.S. 405 (1975), the burden of describing the jobs in dispute rests with the employer. The plaintiff need only prove that he is qualified for the positions the employer has described and intends to fill. We note, however, that the nature of the Postal Service jobs involved was not actually at issue here and the government did not claim that Aikens' description of the positions was inaccurate.

prove that he was the most qualified person for the promotion in question. *See, e.g., Rich* v. *Martin Marietta Corp.*, 552 F.2d 333, 347 (10th Cir. 1975).

We know of no authority, and the District Court opinion cites none, to support the proposition that plaintiff was required to prove that "he was as qualified or more qualified than individuals who were promoted or detailed." Such a proposition is plainly at odds with the test enunciated in *McDonnell Douglas, supra.* Therefore, we must find that the District Court misapplied the law under Title VII when it imposed such an onerous burden with respect to the proof required of plaintiff in order to make out a prima facie case.

The second legal defect is found in conclusion of law number 7, wherein the District Court ruled that it was "critical" for plaintiff to offer "proof of discriminatory motive on the part of defendant." The District Court opinion concludes that "plaintiff has failed to provide such proof." Following this conclusion, the District Court opinion cites *Village of Arlington Heights* v. *Metropolitan Housing Development Corp.*, 429 U.S. 252 (1977).

The entire thrust of the District Court's conclusion of law number 7 reflects an obvious misapplication of the law under Title VII. First, *Arlington Heights, supra,* was decided on a constitutional basis and the Supreme Court has never held that the constitutional standard for adjudicating racial discrimination claims is identical to the standard applicable under Title VII. *Washington* v. *Davis*, 426 U.S. 229, 239 (1976). Second, it is true that some Title VII cases do require proof of discriminatory motive, *see International Brotherhood of Teamsters* v. *United States*, 431 U.S. 324, 335 n.15 (1977), and a showing of

motive may constitute plaintiff's proof that the allegedly legitimate employment consideration articulated by the defendant is merely a pretext for unlawful discrimination. However, the prima facie case in a suit alleging individual discrimination does not require a showing of discriminatory motive. *McDonnell Douglas, supra,* which established the elements of the prima facie case, simply does not impose that burden on the plaintiff.

V.

Since the plaintiff made out his prima facie case, which raises an inference of discrimination, the burden now shifts to the defendant, under the standards of *McDonnell Douglas, supra.* The government may meet Aikens' prima facie showing by articulating a legitimate, nondiscriminatory reason for its failure to promote Aikens to the four positions at issue here. *McDonnell Douglas Corp.* v. *Green,* 411 U.S. 792, 802 (1973). The government's burden is "that of proving that [they] based [the] employment decision on a legitimate consideration, and not an illegitimate one such as race." *Furnco Construction Corp* v. *Waters,* 438 U.S. 567, 577 (1978).

Accordingly, the government is now to be given the opportunity to offer the required proof concerning the legitimacy of the promotion decisions here at issue. At trial, no evidence indicated that the white employees who received promotions to the four positions at issue were as, or more, qualified than Aikens for those jobs. That evidence may be offered on remand, along with other evidence that is relevant and material in rebutting Aikens' prima facie case of discrimination.

Should the government succeed in meeting its burden, Aikens shall then have the opportunity to introduce evidence that the justifications offered by the Postal Service are merely pretexts for discrimination. *Furnco Construction Corp.*, 438 U.S. at 578; *McDonnell Douglas*, 411 U.S. at 804-805.

Because we find that Aikens made out his prima facie case of racial discrimination and that the District Court applied incorrect principles of law in considering plaintiff's case, we reverse the order of the District Court and remand the case for further proceedings consistent with this opinion.

It is so ordered.

79-1574

LOUIS H. AIKENS, APPELLANT

v.

UNITED STATES POSTAL SERVICE
BOARD OF GOVERNORS, APPELLEE

Appeal from the United States District Court
for the District of Columbia
(Civil Action No. 77-0303)

Argued 28 April 1980

Decided 31 July 1980

Dissent filed 9 September 1980

Before WILKEY, WALD, and EDWARDS, *Circuit Judges.*

Opinion for the Court filed by *Circuit Judge* EDWARDS on 31 July 1980.

WILKEY, *Circuit Judge,* dissenting: On 31 July 1980 the majority of this panel reversed a district court ruling which had granted summary judgment to defendants-appellees in this Title VII suit on grounds of appellant's failure to make out a prima facie case of racial discrimination. The panel opinion found two errors of law in the district court's decision, first in its statement that it was "critical" for plaintiff-appellant to show racially discriminatory motive on the part of defendant, and second in its requirement that, to make a prima facie case, plain-

tiff must show he was "as qualified or more qualified than individuals who were promoted or detailed." [1]

In addition, the panel majority made its own assessment of the factual issue of appellant's qualifications. The majority looked primarily to the Supreme Court's standard in *McDonnell Douglas Corp.* v. *Green*, which held that a Title VII plaintiff can establish a prima facie case of racial discrimination by showing:

> (i) that he belongs to a racial minority; (ii) that he applied and was qualified for a job for which the employer was seeking applicants; (iii) that, despite his qualifications, he was rejected; and (iv) that, after his rejection the position remained open and the employer continued to seek applicants from persons of complainant's qualifications.[2]

Of these criteria only the second, in its requirement that plaintiff be "qualified," is at issue in this case. The panel majority concluded that the weight of evidence on record so clearly indicated plaintiff's qualifications for the jobs in question that this court could hold plaintiff to be "qualified" without remanding the issue for a district court finding based on the proper standard.

I agree with the majority that the district court applied an inappropriate legal standard in ruling that it was critical for plaintiff to prove discriminatory motive on the part of defendant. Although the Supreme Court has stated that for "disparate treat-

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[1] *Aikens* v. *United States Postal Serv.*, No. 79-1574, slip op. at 9-10 (D.C. Cir. 31 July 1980).

[2] *McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792, 802 (1973).

ment" cases of this sort proof of discriminatory motive is "critical," [3] the Court has allowed such motive to be proven indirectly in certain circumstances, by inference from "the mere fact of differences in treatment." [4] Because the district court's opinion appears to require direct proof of discriminatory motive, I concur with the majority insofar as they vacate the district court's grant of summary judgment on this erroneous legal basis

I strongly disagree, however, with the majority's treatment of the standard for permissible indirect proof of discriminatory motive and its rationale. The Supreme Court intended its *McDonnell Douglas* standard to identify those situations where, based on plaintiff's initial evidence, the employer's decision appeared "more likely than not" to be a discriminatory one.[5] For the standard to accomplish this goal, the Court acknowledged that it must be applied flexibly, since in light of variations in circumstances of Title VII suits, the specified standard "is not necessarily applicable in every respect to differing factual situations." [6]

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[3] *International Bhd. of Teamsters* v. *United States*, 431 U.S. 324, 335 n.15 (1977). The present case is an instance of alleged disparate treatment on grounds of race, rather than one of "disparate impact," which involves "employment practices that are facially neutral in their treatment of different groups but that in fact fall more harshly on one group than another and cannot be justified by business necessity." *Id.*

[4] *Id.*

[5] *Furnco Constr. Co.* v. *Waters*, 438 U.S. 567, 576 (1978). *See International Bhd. of Teamsters* v. *United States*, 431 U.S. 324, 357-58 & n.44 (1977); *McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792, 801-02 (1973).

[6] *McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792, 802 n.13 (1973).

In the present case the majority has applied the second *McDonnell Douglas* criterion inflexibly with an irrelevant and mechanical standard of "qualification" that bears little relationship to plaintiff's ability to perform well in the managerial positions in question. As a result the majority's concept of a prima facie case has little if anything to do with the likelihood that defendant denied a position to plaintiff for racially discriminatory reasons, which is what the *McDonnell Douglas* standard is supposed to determine. Although this approach finds support in some other lower court opinions, the present case illustrates a potential for the application of the *McDonnell Douglas* standard to lose touch with its purpose. Far from this outcoming being required by the Supreme Court's decisions in this area, it is not consistent with the reasoning of those decisions. I therefore feel compelled to detail my disagreement with the majority's approach and set forth a more appropriate alternative consistent with the purpose of the *McDonnell Douglas* test.

The four positions to which appellant sought promotion by the Washington, D.C., Post Office are managerial in nature. Appellant was already among the highest ranking officers in the D.C. Post Office when he applied for promotion to the four positions of Mail Processing Officer, Acting Mail Processing Representative, Director of the Operations Division, and Customer Services Representative.[7] To be "qualified" for any managerial position at this level requires above all that one have managerial ability—an ability to supervise, direct, and cooperate with others; a personal sense of responsibility and initia-

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[7] *Aikens* v. *Bolger*, No. 77-0303, Findings of Fact ¶¶ 5, 9 (D.D.C. 26 Feb. 1979).

tive; an ability to motivate other persons; and a familiarity with the substantive area of activity for which one is responsible. Such traits of managerial ability are intangible and defy measurement by "objective" means using figures or paper credentials.

To assess plaintiff's qualifications for these positions, however, the majority inexplicably did look first to paper credentials, citing appellant's Master's degree, course work towards a Ph.D., forty years experience in the Post Office, including supervisory positions, performance ratings not less than satisfactory, and participation in performance-enhancing courses and seminars. The majority also noted that appellant had been nominated as a candidate for D.C. Postmaster by the Regional Office (though the list recommended by the District Office did not include him).[8] In addition, appellant was the second choice of the Promotion Advisory Board for two other positions, and he was promoted subsequent to the events at issue here.[9]

The problem with assessing qualifications based on such quantifiable, "objective" criteria is that these criteria bear very little relationship to an employer's real-life decision about which candidate he would prefer for a managerial position. That decision must typically be based much more on a comparative assessment of the subjective managerial talents of candidates than on the basis of objective paper criteria. To say that a candidate meets certain minimal objective criteria for a managerial position says virtually nothing about whether a nondiscriminatory

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[8] *See id.* ¶ 21.

[9] *Aikens* v. *United States Postal Serv.*, No. 79-1574, slip op. at 6-7 (D.C. Cir. 31 July 1980).

employer would choose him over other candidates. As a result, a judicial determination that a Title VII plaintiff is "qualified" in this sense for a managerial position says virtually *nothing* about whether the employer's decision is "more likely than not" to be a racially discriminatory one which is the issue to be determined at the time tests for a prima facie case are applied.

Of course this problem is apt to occur inevitably when one assesses qualifications for a managerial position according to an absolute test rather than a comparative test. If one looks only at the absolute qualifications of the individual isolated from his qualifications relative to other candidates, one is artificially limited to the objective, quantifiable type of criteria; even if they are not significant for real-life decisions, at least they are "something" for a court to go by.

But this dilemma occurs only if we rule out the possibility of a relative assessment of the less tangible qualifications of the various candidates for managerial position. By a comparative technique one can assess how well one candidate has performed in the past compared to another candidate; compare the performance of organizational units for which the candidates were responsible, compare the subjective evaluations from their supervisors in the past, or perhaps compare their general reputations among those for whom they worked. This type of comparison would bear at least some relationship to employment decisions made in the real world. If a court found that a minority candidate was approximately as qualified as a nonminority candidate in this sense, the finding truly would bear some relation to the likelihood that the employer made his decision based on discriminatory racial grounds.

The district court attempted to do precisely this in requiring plaintiff to make some showing that he was "as qualified or more qualified than the individuals who were promoted or detailed." [10] The majority rejects this approach for lack of authority, and it is true that appellee's counsel was unable to cite authority for such an approach at oral argument.

But I cannot agree that the district court's approach is "plainly at odds" with the *McDonnell Douglas* test.[11] The *McDonnell Douglas* Court acknowledged the flexibility necessary if its prima facie case standard is to serve its intended purpose,[12] and further disclaimed any intent to set a specific test for evaluating employment qualifications. On the contrary, the Court expressed a concern that qualifications tests "bear a demonstrable relationship to successful performance of the jobs." [13] More recently, the Court has stated that relative as well as absolute assessment of qualifications is relevant to the *McDonnell Douglas* standard. The Court explained that under *McDonnell Douglas* plaintiff proves discrimination indirectly by presenting evidence to exclude the two most common nondiscriminatory reasons for an employer's rejection of a candidate: "an absolute

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[10] *Aikens* v. *Bolger*, No. 77-0303, Conclusions of Law ¶ 8 (D.D.C. 26 Feb. 1979).

[11] *Aikens* v. *United States Postal Serv.*, No. 79-1574, slip op. at 9 (D.C. Cir. 31 July 1980).

[12] *See McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792, 802 n.13 (1973).

[13] *Id.* at 802 n.14 (quoting *Griggs* v. *Duke Power Co.*, 401 U.S. 424, 431 (1971)).

or relative lack of qualifications or the absence of a vacancy in the job sought." [14]

In light of the purpose of the *McDonnell Douglas* test and the realities of employment decisions, this language should not be ignored, despite the lack of lower court cases that have followed the relative qualifications branch of this standard. The fact is that some employment decisions are made primarily by absolute, noncomparative criteria, while others depend predominantly on relative qualifications in a comparison among candidates. The former approach applies generally for positions that require objectively verifiable skills; if the applicant meets the objective standard for employment, he is "qualified." The relative approach, on the other hand, applies to positions requiring traits that can only be evaluated subjectively, by comparison with other candidates; in this category managerial positions are the clearest example.

Under a comparative approach, plaintiff need not show that he was the most qualified candidate, only that he was approximately as qualified in light of comparative criteria. Although this is necessarily a somewhat vague standard that requires discretion on the part of the trial court, the absolute standard is also vague and discretionary when applied to cases that involve managerial positions with qualifications that cannot be stated in terms of objective criteria. The essential difference is that the relative standard is a discretionary one bearing some relation to actual hiring decisions for managerial positions, while the absolute standard is a discretionary one bearing little or no relation to actual managerial hiring decisions.

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[14] *International Bhd. of Teamsters* v. *United States*, 431 U.S. 324, 358 n.44 (1977) (emphasis added).

Significantly, the Supreme Court's application of the absolute qualification approach has in fact been in the context of positions with objectively verifiable skills; hence the majority's opinion here represents an unthinking extension of Supreme Court doctrine, an extension which is inconsistent with the doctrine's overall purpose. *McDonnell Douglas* involved a plaintiff who had been fired from a job as a mechanic and laboratory technician.[15] For such a job, the ability to perform the required skills can be objectively verified, far more easily at least than for a manager. Similarly, in *Furnco Construction Corp.* v. *Waters*,[16] the Court applied the *McDonnell Douglas* standard in the context of bricklayers,[17] for whom one could judge qualifications in objective, verifiable terms of ability and experience in performing a particular task. So long as we are dealing with nuts, bolts, and bricks, the majority approach would doubtless work well to identify discriminatory hiring practices.

To extend an absolute qualifications approach to managerial positions, however, not only defeats the purpose of the *McDonnell Douglas* standard, but also leads to distorted and unjust results. If courts establish minimal objective criteria for qualifications in managerial positions,[18] *then any supervisory employee satisfactorily performing his present job can claim to be "qualified" in this vague sense for promotion to*

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[15] *McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792, 794 (1973).

[16] 438 U.S. 567 (1978).

[17] *See id.* at 569-71.

[18] *See, e.g., Rich* v. *Martin Marietta Corp.*, 522 F.2d 333, 347-48 (10th Cir. 1975).

the next higher position. The consequences are clear for any employer who contemplates promoting a superior nonminority employee over a marginally qualified minority employee: since the minority employee will automatically be able to make out a prima facie case of discrimination, it will make no sense for the employer to promote the superior candidate over the marginal candidate unless he has available sufficient resources of time and money to rebut the prima facie case in extended litigation.

The only alternative strategy for the employer would be to devise some type of "objective" qualifications test for managerial employees, which would preclude a prima facie case by showing that those passed over for managerial positions were not "qualified." But the difficulty, not to say impossibility, of devising an objective test to identify those who would be best in a managerial position, simply highlights the absurdity of using an absolute, objective test rather than a relative one to determine managerial qualifications under *McDonnell Douglas.*

We recognize, of course, that comparative criteria may always come into evidence at the stage of a Title VII suit at which defendant attempts to rebut plaintiff's prima facie case. As a matter of theory this may seem of equal value to a relative qualifications approach used at the threshold stage of assessing the sufficiency of plaintiff's prima facie case. But as a practical matter of litigation expense, the former is likely to be significantly more costly than the latter. To impose this added expense of making an affirmative defense on a defendant, who has not even been shown more likely than not to have discriminated, is neither fair nor consistent with usual trial procedure.

It should be recognized that a relative test of qualifications would generally be more difficult to satisfy than an absolute, objective test. But this merely corresponds with the fact that racial discrimination is by nature more difficult to prove by indirect evidence for a highly subjective decision—such as the hiring of managers—than for decisions made according to objective and verifiable criteria. Courts must weight the danger of unpunished discriminatory decisions in the hiring of managers, against the unfairness of subjecting innumerable innocent employers to the cost of overcoming a prima facie case built on thin air. By applying a relative qualifications test where appropriate, courts at least conform their decisions to the realities of hiring decisions and thus increase the probability of just results.

By contrast, the use of an absolute test of qualifications for managerial positions can easily force the burden of rebutting a prima facie case upon an employer who has never come close to making a discriminatory hiring decision. Even an employer who actively favors minority applications could come under the gun, if he just once passed over a marginal minority candidate for promotion to a managerial position in favor of a highly qualified nonminority candidate. The potential for a standard to lead to such possible injustice should give us pause.

In the present case we do not know whether defendant discriminated in its promotion decision. The possibility that we may be finding a prima facie case against a totally nondiscriminatory employer is suggested, however, by the district court's findings that (1) during the period in question "blacks as well as whites were promoted or detailed to positions above plaintiff's position," (2) there has been a considera-

ble increase in the number of high level black employees in the D.C. Post Office during and since the period covered by the complaint, and (3) at the present time "almost all high level positions are held by blacks." [19]

On the present record it is unclear whether plaintiff was as qualified as other candidates for the managerial positions in question. I would remand to the district court for a finding on this issue based on relative as well as absolute criteria of qualification, but not requiring direct proof of discriminatory motive on the part of defendant. I therefore dissent from the majority's entering a finding of qualification instead of remanding this issue to the district court.

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[19] *Aikens* v. *Bolger*, No. 77-0303, Findings of Fact ¶¶ 15-16 (D.D.C. 26 Feb. 1979).

APPENDIX F

No. 79-1574

LOUIS H. AIKENS, APPELLANT

v.

U.S. POSTAL SERVICE BOARD OF GOVERNORS, ET AL.

United States Court of Appeals
For the District of Columbia Circuit

September Term, 1980

Civil Action 77-0303

Filed Nov. 20, 1980

Before: WILKEY, WALD and EDWARDS, *Circuit Judges.*

ORDER

Upon consideration of the petitions for rehearing filed herein by appellant and by appellees, it is

ORDERED by the Court that both petitions for rehearing are denied. Inasmuch as appellees' peti-

tion indicates some confusion about the meaning to be ascribed to the original opinion of this Court, a short clarifying statement is attached hereto.

Per Curiam
For the Court:

/s/ _____
GEORGE A. FISHER
Clerk

Memorandum Opinion *Per Curiam*

Separate statement by Circuit Judge Wilkey

APPENDIX G

No. 79-1574

LOUIS H. AIKENS

v.

UNITED STATES POSTAL SERVICE

Nov. 20, 1980

MEMORANDUM

Before: WILKEY, WALD and EDWARDS, *Circuit Judges.*

PER CURIAM: The Government and the appellant have petitioned this court for a rehearing in this case. We hereby deny their petitions for the reasons set forth in the majority opinion issued by this panel on July 31, 1980. In addition, since Government's petition indicates some confusion about the meaning to be ascribed to the original opinion of this court, we have set out a short clarifying statement.

The Government petitions for rehearing because it fears that this court has misunderstood the decision of the District Court. In its Findings of Fact (FOF) and Conclusions of Law (COL),[1] the trial court re-

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[1] The trial court's findings and conclusions were filed February 26, 1979. They are reproduced in full in Appellant's Appendix ("App.") at 14.

cited the burdens of proof that a plaintiff and defendant face in the course of a Title VII trial. The District Court correctly noted that a plaintiff must first make out a prima facie case of discrimination, COL ¶ 4, App. at 23, after which the burden of going forward falls on the defendant, who must show some legitimate nondiscriminatory reason for the action complained of. COL ¶ 5, App. at 23. If the Defendant meets his burden, the "ultimate burden of proof rests upon the plaintiff." COL ¶ 6, App. at 23. The Government asserts that the trial court found that the Government had met its burden of proof and that the plaintiff had not met his "ultimate burden." Indeed, the Government's petition for rehearing is premised on these assertions both of which we find to be erroneous. We simply do not read the trial court's opinion as reaching the conclusions here advanced by the Government.

In the concluding paragraphs of the Conclusions of Law, the District Court stated that "Plaintiff has failed to provide" proof of discriminatory motive, COL ¶ 7, App. at 24, and that

> 8. The Court finds that plaintiff has failed to present a *prima facie* case of racial discrimination in that plaintiff failed to prove that he was as qualified or more qualified than the individuals who were promoted or detailed. Plaintiff has further failed to demonstrate that the reclassification of his position or the processing and final outcome of his appeal of the reclassification were in any way the products of racial discrimination.

COL ¶ 8, App. at 24. We read the trial court's opinion as finding only that the plaintiff had failed to

make out a prima facie case. We do not read the lower court opinion as making any findings on whether the defendant met his burden of going forward and, if so, whether the plaintiff carried the ultimate burden of proof.

The majority opinion in this case specifically rejected the trial court's finding that the plaintiff had failed to make out a prima facie case. *See Aikens* v. *United States Postal Service*, 79-1574, slip op. at 8 (July 31, 1980). Consequently, because the trial court made no express findings on whether the defendant met its burden of proof or, even if it had, whether the plaintiff had met his burden on rebuttal, we remanded the case for further proceedings.

A review of the record indicates that the District Court held a full trial on the merits of this case. However, this court can only review those findings of fact and conclusions of law that the trial court actually made. We need not, and should not, parse through the record to guess whether the defendant has met his burden in this case. It is the job of the trial court to make the necessary findings of fact and conclusions of law. *See* Rule 52(a), Federal Rules of Civil Procedure.

Our opinion remanded the case "for further proceedings consistent with this opinion." Slip op. at 11. On remand the trial court should make findings and draw conclusions on whether the defendant has met its burden of proof, i.e. whether the defendant has "articulate[d] some legitimate, nondiscriminatory reason for the employee's rejection." *McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792, 802 (1973). *See Furnco Construction Corp* v. *Waters*, 438 U.S. 567 (1978). If, and only if, the trial court expressly finds that the defendant has met its burden, then the

court should make a finding as to whether the plaintiff has met his burden of showing that the defendant's reason "was in fact pretext." 411 U.S. at 804. *See Furnco, supra,* 438 U.S. at 578 ("The plaintiff must be given the opportunity to introduce evidence that the proffered justification is merely a pretext for discrimination.") We leave it to the District Court to determine whether these findings can be made on the present record.

No. 79-1574

AIKENS

v.

UNITED STATES POSTAL SERVICE

WILKEY, *Circuit Judge*: In the original review of this appeal the views expressed in both the majority opinion and my dissent turned on our very particular analysis of what constitutes a prima facie case of racial discrimination under *McDonnell Douglas*. Though I disagreed with the majority's excessively lenient view of what "qualifications" a Title VII plaintiff must demonstrate to make out a prima facie case, I concurred in the remand because it did appear that the district court predicated its finding of no prima facie case on an erroneous conclusion. That court mistakenly interpreted the case law as requiring *direct proof* of discriminatory motive. The district court, however, conducted a full trial notwithstanding its finding that the plaintiff failed to establish a prima facie case. In other words, now postulating the existence of a prima facie case, the trial judge should have little difficulty in framing explicit conclusions under the remaining *McDonnell Douglas* constructs; (a) Did the plaintiff show that the asserted reason was a mere pretext for discrimination?

At the close of plaintiff's case, the defendant made a Rule 41(b) motion for a directed verdict claiming that the plaintiff had failed to make out a prima facie case. Since the trial judge *denied* this motion, and required the defendant to go forward, it is likely that the judge would now have at his disposal evidence and testimony sufficient to undertake express analysis according to the two remaining *McDonnell Douglas*

rubics. In fact, it appears that both parties spoke their piece at trial on the issue of job-related discrimination. It also appears that the trial judge did actually evaluate the proffered testimony and evidence in light of *McDonnell Douglas*' pattern of shifting burdens of going forward. The trial judge found that

> [a]fter the presentation of such a *prima facie* case, *the burden of going forward falls on the defendant.* This burden is met if either *discrimination is shown to have not existed* or if *some legitimate nondiscriminatory reasons* for the action complained of can be shown to exist. . . .

Conclusion of Law ¶ 5, *reprinted in* Appendix at 23 (emphasis added). So, even though "the trial court made no *express* findings on whether the defendant met its burden," *see* Memorandum (per curiam) *ante* (emphasis added), the trial judge did find that the "[p]laintiff . . . *failed to demonstrate* [*that his complaints*] *were in any way the products of racial discrimination,*" Conclusion of Law ¶ 8, *reprinted in* Appendix at 24 (emphasis added). By reading Conclusions of Law ¶¶ 5 and 8 together, and focusing on the trial court's explicit finding of *no racial discrimination* on any level, we can see that the defendant's *McDonnell Douglas* burden of going forward figured prominently in the trial and decision below.

The confusion here derives from the narrow focus of our appeal which was confined to the "qualifications" aspect of a prima facie case; a factor which is an initial consideration within a Title VII lawsuit. The plaintiff's action, it is now clear, was *not* terminated because of the district court's decision against him on the question of prima facie case. This negative holding on prima facie case would normally be a conclusive threshold question, but here, apparently, it was not, as a *full trial* was held.

APPENDIX H

Civil Action No. 77-0303

LOUIS H. AIKENS, PLAINTIFF

v.

WILLIAM F. BOLGER, DEFENDANT

Feb. 26, 1979

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This matter having been tried by the Court on January 2, 1979 through January 3, 1979, and the Court having considered the testimony of the witnesses, various exhibits admitted in evidence and the applicable law, makes the following findings of fact and conclusions of law:

FINDINGS OF FACT

1. This case arises under Section 717 of Title VII of the Civil Rights Act of 1964 as amended, 42 U.S.C. 2000e *et seq.*

2. Plaintiff, a black male, was an employee of the U.S. Postal Service (and its predecessor organization) in Washington, D.C. at all times pertinent to this complaint, and alleges in his Complaint that he is a victim of unlawful employment discrimination on account of his race.

3. The defendant is William F. Bolger, the present Postmaster General, who is the head of the U.S. Postal Service, an independent establishment in the Executive Branch of the U.S. Government.

4. On February 18, 1977, plaintiff filed this action under Title VII of the Civil Rights Act, as amended, 42 U.S.C. § 2000e *et seq.* for alleged racial discrimination in Federal employm nt. Plaintiff seeks a retroactive promotion, retroactive pay based on the promotion, increased payments into the retirement fund, increased insurance, and reasonable attorney's fees and costs.

5. Plaintiff filed an Equal Employment Opportunity complaint with the defendant on January 4, 1974. Defendant's Exhibit A, Administrative Record (Record), Appeals Review Board Decision at p. 1. Civil Service regulations require that a complaint be filed within 30 days of the alleged discriminatory act, 5 CFR 713.214. Plaintiff failed to file timely complaints except with regard to promotions or details to the following positions:

> Mail Processing Officer—effective December 13, 1973.
>
> Acting Mail Processing Representative—effective January 9, 1974.
>
> Director, Operations Division—effective February 17, 1973 and renewed every 90 days to the complaint.
>
> Customer Services Representative—effective January 12, 1974.

As a result, at the proceeding before the Civil Service Commission, only those four agency actions were considered because they were the only ones for which a timely complaint had been filed. Record, at pp. 1-2 of the Findings and Recommended Decision.

Plaintiff was aware of the E.E.O. complaints process. He was chairman of the Postmaster's E.E.O.

Committee for a period of three years, and at the time he filed his complaint he had been the E.E.O. Administrative Officer for the District of Columbia Post Office for approximately two years.

Plaintiff admits that he did not file a complaint after each alleged discriminatory act, that he filed only one complaint, and that he was aware of the resulting limitations placed by the Civil Service Commission upon the issues to be considered in his complaint.

6. By decision dated December 3, 1975, and following an investigation (including a three-day hearing before a Complaint's Examiner), the United States Postal Service found that the evidence of record did not support complainant's allegation of race discrimination. Based on the record before it, the Postal Service decision was affirmed by the Appeals Review Board of the United States Civil Service Commission on January 13, 1977. Record, Decision of the Appeals Review Board, pp. 1, 6.

7. Plaintiff alleges in his complaint that he was discriminated against because he was denied promotions and details during the period from August, 1966, and thereafter, because his position was reclassified making him ineligible for the Postmaster's position, because his appeal of the reclassification was delayed, and because various individuals interfered with and misled investigations into plaintiff's allegations of race discrimination.

8. During plaintiff's tenure with the Post Office he received numerous promotions, transfers, and details, including the following:

1960—Promoted from Foreman-7 to Foreman-9.

1962—Promoted to Methods and Standards Analyst-10

1964—Promoted to Assistant Tour Superintendent-11

1965—Lateral transfer to Superintendent of Main Window Service

1966—Promotion to Tour Superintendent-13

1966—Promotion to Assistant Director for Transit Mails-15

1974—Promotion to Area Logistics Manager-21

1974—Detailed to position of Assistant Director for Operations-24

9. As a result of these promotions, prior to March, 1973, plaintiff was the fifth highest ranking individual in the District of Columbia Post Office.

10. During the period 1966 to 1974, plaintiff was offered and refused the following positions:

a. Director of Finance—a lateral transfer

b. Director of Personnel—a lateral tranfer

c. Quality Control Officer—promotion from 20 to 21

d. Assistant Tour Superintendent—promotion from 20 to 21.

11. Plaintiff informed his supervisors that he was only interested in the positions of Director of Installation and the Postmaster of the District of Columbia. The Director of Installation position was occupied by another individual at the time this notice was given.

12. Plaintiff refused the position of Director of Personnel because he stated he would "hate to have to start boning up on personnel in order to take over a new division."

13. The experience which plaintiff would have gained if he had accepted the positions of Director of Finance and Director of Personnel would have provided plaintiff with a broader background in all phases of Post Office work. If plaintiff had demonstrated satisfactory performance in these positions, it would have been of considerable advantage to him in being considered for other positions.

14. Experience in a variety of positions with the Post Office was considered important because it was thought to increase an individual's management abilities and thus provide an opportunity to become familiar with the overall operation of the system. Individuals who accepted positions in various management levels were more likely to receive promotions or details to other positions. Although not required to take all positions which were offered, individuals who refused such offers were considered by management to be satisfied with their positions. Conversely, if one accepted the various management positions offered, this would support one being considered for advancement.

15. Plaintiff produced no evidence that he was treated any differently because of his race. During the period in question, other blacks as well as whites were promoted or detailed to positions above plaintiff's position. A black was selected for the position of Postmaster of the District of Columbia in January, 1974, a position which plaintiff contends he was not selected for because of his race.

16. During the period covered by this complaint and continuing to the present, there was a considerable increase in the number of black employees occupying high level positions in the District of Columbia Post Office. At the present time almost all high level positions are held by blacks.

17. Plaintiff produced no credible evidence that he was as qualified or more qualified than other individuals who were detailed or promoted during the period in question.

18. Plaintiff produced no evidence of specific acts of discrimination against him.

19. It was not unusual for the Postal Service to use details to fill positions and the Postal Service regulations provide for such details. Details of individuals during this time period were conducted in accordance with the regulations established by the Postal Service. If extensions of details were required, appropriate authorization was obtained.

20. Plaintiff produced no evidence that any individuals interfered with or misled investigations into plaintiff's allegations of race discrimination.

21. In July 1972, the District Manager, Carlton Beall, recommended a list of three persons for the position of Postmaster of the District of Columbia, one of whom was black, William Gordon. The Regional Office added the plaintiff's name to the list. The list of recommended candidates was not forwarded from the Regional Office to Headquarters for a final decision at that time. It was considered desirable to delay the selection because:

1. the Job Evaluation Program was being implemented and could result in changes in job classifications which might change the qualifications of the candidates, and

2. a reorganization was being considered which would reunite the position of Postmaster and District Manager. Both of these events would have had a direct impact on the selection of an individual for the Postmaster's position.

22. As a result of the Job Evaluation Program (JEP) plaintiff's position was ranked at a Grade 20. The Postmaster position was ranked at Grade 29. In order to be eligible for consideration, an individual needed to be within six grades of the Postmaster's grade. As a result of the JEP, plaintiff was no longer eligible to be considered for the Postmaster's position.

23. Thereafter, a new selection procedure was commenced and the District Manager, Carlton Beall, submitted the same three names for consideration, which had been submitted in July 1972, including William Gordon, a black. The regional office added Martin Simms, the Postmaster of Jamaica, New York, who is black. Mr. Simms was selected and assumed the Postmaster's position in January, 1974. Following Mr. Simms' retirement, William Gordon, a black originally recommended by Carlton Beall, was selected as the Postmaster for the District of Columbia.

24. It was not unusual for someone outside the region to be selected as Postmaster. This occurred in several large cities, including Pittsburgh, Buffalo and Philadelphia.

25. It was likewise not unusual for the selection of Postmasters to be delayed during this period. This occurred in other cities such as Pittsburgh and Buffalo because of the initiation of the JEP program or because of the reorganization of the dual district manager-postmaster positions.

26. Individuals involved in the selection of the Postmaster position were not involved in the JEP program. Final selections for postmasters were made at the National Headquarters and no one from the District of Columbia Post Office on the Regional Post Office attempted to influence the National Headquarters staff after the initial District submissions

of the three candidates. In particular, no one from the District of Columbia Post Office or the District Office requested that the selection process be delayed.

27. The Job Evaluation Program was designed to ensure comparability between the Postal Service and the private sector and to establish standardized position description throughout the country. Standard position descriptions for similar positions were developed after interviews and studies were conducted around the country. At the time the standard position descriptions were being formulated, there were a total of twelve persons occupying the position of Assistant Director, Transit Mails throughout the country. Of that number, six incumbents were interviewed, including those in Pittsburgh, Philadelphia, Seattle, and Detroit. A standard job description was developed for that position rated at a PES-20 and all persons were rated at a PES-20, including the plaintiff.

28. Almost all postal service positions were converted on March 3, 1973 to the ratings established by JEP. Many individuals were dissatisfied with the evaluation and filed appeals. In May, 1974, approximately 1,900 appeals from the JEP were pending. As a result, the delay which occurred in the processing of the plaintiff's appeal was not unusual.

29. Plaintiff's appeal was reviewed and his appeal was denied. It was determined that his position was within the standard position description established for all Assistant Directors for Transit Mail throughout the country. The appeals process took into consideration the fact that certain events were going to occur. For example, the beltway terminal and railroad post office were to be discontinued and the bulk mail center facilities would be started. Furthermore, when JEP went into effect it was not unusual to have

inconsistencies in reporting relationships such as having a PES 22 report to a PES 20.

30. Three other positions in the District of Columbia Post Office which were assigned to a grade 15 before JEP were assigned to a grade 23 after JEP, however, these positions differed from the position of Assistant Director for Transit Mails.

31. At the time the JEP appeal was processed, it does not appear that anyone handling the appeal knew plaintiff's race, or that he was being considered for the Postmaster position. The appeal was not intentionally delayed and it does not appear that anyone processing the appeal was contacted by anyone in the District of Columbia Post Office or the District Office. There is no evidence that the plaintiff was discriminated against in the processing or ultimate outcome of the appeal because of his race.

CONCLUSIONS OF LAW

1. This Court has jurisdiction over this action pursuant to 42 U.S.C. § 2000c-16(c). *Chandler* v. *Roudebush*, 425 U.S. 840 (1976).

2. Although evidence of discrimination occurring prior to the effective date (March 24, 1972) of the 1972 Amendments to Title VII of the Civil Rights Act of 1964 may be relevant, no violation of Title VII arises from pre-Act conduct. *Hazelwood School District* v. *United States*, 433 U.S. 299, 309-310 (1977).

3. A discriminatory act which is not made the basis for a timely charge is the legal equivalent of a discriminatory act which occurred before the Civil Rights Act of 1964 was passed. It may constitute relevant background evidence in a proceeding in which the status of a current practice is at issue,

but separately considered, it has no present legal consequences. *United Air Lines* v. *Evans*, 431 U.S. 553 (1977). Failure of a postal service employee to comply with the filing provisions of the Civil Rights Act of 1964 may result in dismissal of the action. *Adams* v. *Bailar*, 426 F.Supp. 263 (1976).

4. The plaintiff has the burden of proving discrimination by a preponderance of the evidence in an action arising under 42 U.S.C. 2000(e)-16. *Hackley* v. *Roudebush*, 520 F.2d 108, 117-118 (D.C. Cir. 1975). Such proof is initially provided by the presentation of a *prima facie* case of discrimination, the elements of which vary depending upon the nature of the discrimination alleged. See generally, *McDonnell Douglas Corp.* v. *Green*, 411 U.S. 798 (1972); *Causey* v. *Ford Motor Co.*, 516 F.2d 416 (5th Cir. 1975).

5. After the presentation of such a *prima facie* case, the burden of going forward falls on the defendant. This burden is met if either discrimination is shown to not have existed or if some legitimate nondiscriminatory reason for the action complained of can be shown to exist, *i.e.*, if the allegedly discriminatory act would not have occurred "but for" discrimination. *Day* v. *Matthews*, 530 F.2d 1083 (D.C. Cir. 1976).

6. The ultimate burden of proof rests upon the plaintiff. It is not enough for plaintiff to show that he is black and was somehow injured in his employment status. *Taliaferro* v. *Bailar*, unreported, Civil Action No. 75-2137. (D.C.D.C., September 15, 1976). Rather, it is necessary to demonstrate by a preponderance of the evidence that the defendant's personnel actions were attributable to discrimination on the basis of race.

7. Critical to this showing is proof of discriminatory motive on the part of defendant. *Teamsters* v. *United States*, 421 U.S. 324, 335 at n.15 (1977).

Plaintiff has failed to provide such proof in that he has failed to show that defendant has (a) followed a pattern of actions unexplainable on nondiscriminatory grounds, and (b) departed from normal procedural standards in his treatment of plaintiff, *Village of Arlington Heights* v. *Metropolitan Housing Corp.*, 429 U.S. 252 (1977).

8. The Court finds that plaintiff has failed to present a *prima facie* case of racial discrimnation in that plaintiff failed to prove that he was as qualified or more qualified than the individuals who were promoted or detailed. Plaintiff has further failed to demonstrate that the reclassification of his position or the processing and final outcome of his appeal of the reclassification were in any way the products of racial discrimination.

/s/ George L. Hart, Jr.
United States District Judge

APPENDIX I

Civil Action No. 77-0303

LOUIS H. AIKENS, PLAINTIFF

v.

WILLIAM F. BOLGER, DEFENDANT

ORDER OF DISMISSAL

Upon consideration of the Findings of Fact and Conclusions of Law filed herein, this date, it is by the Court this 26th day of February, 1979

ORDERED: That this action be and the same is hereby dismissed with prejudice.

/s/ George L. Hart, Jr.
GEORGE L. HART, JR.
United States District Judge

APPENDIX J

Civil Action No. 77-0303

LOUIS H. AIKENS, PLAINTIFF

v.

WILLIAM F. BOLGER, DEFENDANT

JUDGMENT ON FINDING OF COURT

This cause having come on for trial before the Honorable George L. Hart, Jr., and the issues having been duly heard and Findings of Fact and Conclusions of Law having been filed, it is this 26th day of February, 1979,

ORDERED AND ADJUDGED that judgment is entered in favor of the defendant, William F. Bolger and against the plaintiff, Louis H. Aikens.

/s/ _____

JAMES F. DAVEY
Clerk

By /s/ _____

DEAN F. MILLER
Deputy Clerk

☆ U. S. GOVERNMENT PRINTING OFFICE: 1981 358808 711

Joint Appendix

Office-Supreme Court, U.S.
FILED
JUN 4 1982
ALEXANDER L. STEVAS,
CLERK

No. 81-1044

In the Supreme Court of the United States

OCTOBER TERM, 1981

UNITED STATES POSTAL SERVICE BOARD OF GOVERNORS,
Petitioner

v.

LOUIS H. AIKENS

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

JOINT APPENDIX

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PETITION FILED: DECEMBER 4, 1981
PETITION GRANTED: MARCH 22, 1982

In the Supreme Court of the United States

OCTOBER TERM, 1981

No. 81-1044

UNITED STATES POSTAL SERVICE BOARD OF GOVERNORS,
Petitioner

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LOUIS H. AIKENS

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

JOINT APPENDIX

TABLE OF CONTENTS OF APPENDIX

	Page
Relevant Docket Entries	1
Stipulation Of Facts, filed January 5, 1979	6
Order allowing certiorari	12

RELEVANT DOCKET ENTRIES

DATE	PROCEEDINGS
1977	
Feb 18	COMPLAINT.
Feb 18	SUMMONS (13) and copies (13) of complaint issued. ALL defts ser 2-24-77. U.S. Atty ser 2-25-77.
Apr 26	ANSWER by defts. to complaint; c/m 4-26-77. Appearance of Michael J. Ryan.
Apr 26	CALENDARED. CAL/N.
	MOTION by defts. to dismiss the complaint vs. defts. #3 thru 11; memorandum; c/m 4-26-77.
May 6	STATEMENT of points and authorities by pltff. in opposition to defts' motion to dismiss the complaint vs. defts. #3, 4, 5, 6, 7, 8, 9, 10 and 11; c/s 5-6-77.
May 9	CHANGE of address of L. Harold Aikens, Jr. attorney for pltf.; c/m 5-9-77. CD/N
May 20	MOTION of defts. #3 thru #11 to dismiss complaint heard and granted. Discovery close July 20, 1977. (Rep. E. A. Kaufman) Hart, J.
May 23	ORDER filed May 20, 1977 granting defts' motion to dismiss and deft., Bolger, Ching, Codding, Hardesty, Holding, Irvine, Nevin, Robertson and Wright are dismissed from this action. (N) Hart, J.
Jun 20	INTERROGATORIES by pltff. to deft.; c/s 6-20-77.
Jul 27	STIPULATION extending deft's time to and including 8-16-77 to answer pltff's interrogatories. (FIAT) (N) Hart, J.
Sept 13	OBJECTIONS by deft. to first interrogatories of pltf.; c/s 9-13-77.

DATE	PROCEEDINGS
1977	
Sept 13	ANSWERS by deft. to first interrogatories of pltf.; appendices A thru D; c/s 9-13-77.
1978	
June 14	STATUS Hearing. Court will mail a pre-trial order. Trial to be set later. (Rep: E. Sanche) Hart, J.
June 19	PRETRIAL Order filed 6-15-78. (N) Hart, J.
Jul 24	SUPPLEMENTAL answer by defts. to pltff's first interrogatories; attachments (3).
Aug 1	MOTION by deft. for enlargement of time to & including 8/16/78 within which the defts. may file a list of witnesses and exhibits.
Aug 1	PRETRIAL statement of pltff.; appendix; Exhibits 1 thru 24.
Aug 9	ORDER FILED Aug. 8, 1978 enlarging deft's time to file list of witnesses and exhibits to and including 8-16-78. (N) Hart, J.
Aug 16	LIST by defts. of witnesses and exhibits; Exhibit 1 (3 vols.), exhibit 2 & 3.
Aug 31	MOTION by defts. #1 & 2 for extension of time to submit responsive pre-trial brief.
Sept 05	ORDER filed 9/1/78 granting an extension of time to and including 9/11/78 for deft. to file a responsive pre-trial brief (N) Hart, J.
Sept 11	PRE-TRIAL STATEMENT by Deft.; Attachments (2)
Oct 16	REPLY by pltff. to Pretrial Statement.
Nov 13	APPEARANCE of Susanne M. Lee, as counsel for deft. CAL/N.
Nov 28	STATUS HEARING. Trial set Jan. 2, 1979 at 10:00 A.M. (Rep. E. A. Kaufman) (N) Hart, J.

DATE	PROCEEDINGS
1978	
Dec 6	NOTICE by defts. to take deposition of Tommy Wilson; Exhibit.
Dec 7	NOTICE by defts. to take deposition of Victor Dunbar.; Exhibit.
Dec 8	NOTICE by defts. to take deposition of Thomas Roberts; Exhibit.
Dec 8	NOTICE by defts. to take deposition of Francis Schwartz; Exhibit.
Dec 21	NOTICE by defts. to take deposition of Ellsworth Rapee; Exhibit.
Dec 22	DEPOSITION of Victor Dunbar for the deft.; Exhibit A & B.
Dec 26	DEPOSITION of Francis M. Schwartz taken on 12-18-78 for the deft.
Dec 28	DEPOSITION of Tommy L. Wilson taken on 12-13-78 for the deft.
Dec 29	STIPULATION of facts.
1979	
Jan 2	TRIAL by Court begun; respited to 1-3-79 at 9:30 A.M. (Rep. Joan Blair) Hart, J.
Jan 3	TRIAL resumed; concluded; counsel for each side present; proposed findings of fact and conclusions of law by Feb. 1, 1979. (Rep. E. A. Kaufman) Hart, J.
Jan 5	EXHIBITS of pltff. #1, #2 and #3-A thru #4. (C.R. blotter)
Jan 26	TRANSCRIPT of Proceedings of Jan. 3, 1979; pages 254-280; Rep. Thomas Dourian; Court Copy.
Feb 1	NOTICE by deft. of filing proposed findings of fact and conclusions of law by deft.

DATE	PROCEEDINGS
1979	
Feb 1	PROPOSED Findings of Fact and Conclusions of Law by pltff.
Feb 13	DEPOSITION of Thomas J. Roberts for the deft.
Feb 26	FINDINGS of Fact and Conclusions of Law. (N) Hart, J.
Feb 27	ORDER filed Feb. 26, 1979 dismissing the action with prejudice. (N) Hart, J.
Feb 28	JUDGMENT filed 2-26-79 in favor of deft. and against the pltf. (N) HART, J.
Mar 30	TRANSCRIPT of proceeding of 1-2-79; (Rep: J. Blair); Pages 1-157; court copy.
Mar 30	TRANSCRIPT of proceedings of 1-3-79; (Rep: J. Blair): Pages 158-337; court copy.
Apr 27	NOTICE of appeal of pltf. from judgment entered on 2-26-79; $5.00 paid & credited to the U.S.; Copy mailed to Susanne M. Lee & Michael J. Ryan.
June 06	RECORD on appeal delivered to USCA; Receipt acknowledged (79-1574)
1981	
Jan 6	CERTIFIED COPY OF JUDGMENT from USCA dtd 7-31-80 reversing District Court's decision and remanded case for further proceedings consistent with the opinion of USCA filed herein; opinion.
Jan 6	BILL OF COSTS as taxed by Clerk of Court of Appeal against appellee in the amount of $150.20.
Jan 14	CHANGE OF ADDRESS for pltfs. counsel L. Harold Aikens, Jr., 1613 Crittenden St. N.E. 20017; tel: 755-6545. HART, J.

DATE	PROCEEDINGS
1981	
Jan 14	STATUS HEARING AFTER REMAND: deft. considering an appeal to the Supreme Court. Stay is granted until 2-20-81. Advise the Court in writing re: status. (Rep. Joan Blair) HART, J.
Jan 19	ORIGINAL RECORD returned from USCA, 1 vol., 3 transcripts, 5 exhibits in manila envelope & 4 depositions. (USCA#79-1574)
Mar 25	NOTICE by defts. of filing a copy of an Order by the Supreme Court dated 3-13-81, attachment.
Apr 27	NOTICE by defts. of filing a copy of the Petition for a Writ of Certiorari to the U.S.C.A. filed 4-20-81, attachment.
July 2	NOTICE by defts. of filing a copy of the decision of the Supreme Court, 49 U.S.L.W. 3967 (June 30, 1981); attachment.
Oct 06	CERTIFIED copy of Amended Judgment from USCA dated 9-8-81, Ordered & Adjudged Vacating the Judgment of the District Court and REMANDING case to the District Court for further proceedings. OPINION (USCA#79-1574)
Dec 22	NOTICE by defts. of Filing; Attachment—Petition for writ of Certiorari to USCA.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 77-0303

LOUIS H. AIKENS, PLAINTIFF

v.

WILLIAM F. BOLGER, DEFENDANT

Filed Jan. 5, 1979

STIPULATION OF FACTS

Counsel for Defendant and counsel for Plaintiff hereby stipulate to the following facts for the purpose of trial in the above-captioned action:

1. Plaintiff, a black male, was an employee of the U.S. Postal Service (and its predecessor organization) in Washington, D.C. at all times pertinent to this complaint.

2. Title VII of the Civil Rights Act of 1964, as amended, is applicable to the U.S. Postal Service, an independent establishment in the executive branch of the U.S. government, which is headed by the Postmaster General.

3. As of February 7, 1974, the employee complement of the Washington, D.C. Post Office totaled 8,634 employees, 7,403 of whom were of a minority group background (85.7%).

4. As of the above date, 84.3% of Category I employees (covered by the 1973 National Agreement) were of a minority group background; 65.9% of Category II employees (not covered by the Agreement and in pay levels 1-14, except Postmasters and Supervisors) were of a minority group background; 51.6% of Category III employees (not covered by Agreement and in pay levels 15 and above including all Supervisors and Postmasters) were of a minority group background.

5. From August 27, 1966 until January 8, 1972, plaintiff was the highest ranking black in the Washington, D.C. Post Office.

6. Plaintiff was not detailed or promoted above his position of Assistant Director, Operations Division for Transit Mails from August 27, 1966 to January 9, 1974.

7. From August 27, 1966 to January 9, 1974, the following twelve whites, all of whom, with the exception of one, were junior to plaintiff in supervisory seniority, progressed in their careers, being detailed and or promoted to higher levels: Dominic M. Barranca, Lawrence V. Bateman, Jr., August J. Eckerl, Louis M. Lieb, Francis A. Miller, Ellsworth H. Rapee, Elmer C. Ray, Marvin G. Thomas, Carmen Errico, William E. Hahn, Donald J. Robertson, and Joseph J. Spelta.

8. Plaintiff had more overall seniority than his twelve white colleagues named in paragraph 7.

9. With one exception, that of J. J. Spelta, who was promoted on October 16, 1951, plaintiff, who was promoted on October 1, 1952, held more seniority as a supervisor than his white colleagues.

10. With the exception of four of the supervisors named, all had salaries above the $24,066 earned by the plaintiff at the time he filed his complaint on January 4, 1974.

11. There was no derogatory or negative information found in plaintiff's Official Personnel Folder to indicate that he had not fulfilled the requirements of his position.

12. Of the twelve white supervisors named in paragraph 7, the educational level of two, Barranca and Spelta, is unknown; Miller completed 10th grade; Rapee and Ray completed 11th grade; Eckerl, Lieb, Thomas, Errico, and Hahn completed high school; Barranca completed 8 months of college; and Robertson completed 1 and ½ years of college.

13. Carlton Beall completed the 10th grade.

14. Plaintiff has a Master's degree and completed 3 years residence on his Ph.D.

15. Plaintiff participated in the first National Conference on Equal Employment Opportunity in the Postal Service in September 1967; subsequently he was Chairman of the Postmaster's E.E.O. Committee for a period of three years; and at the time of filing his E.E.O. complaint had been the E.E.O. Administrative Officer for the City Post Office for approximately two years.

16. In 1968 Plaintiff was rated as "an outstanding supervisor whose management abilities were far above average."

17. Plaintiff had as many, or more, training and development courses and seminars as did the twelve white supervisors.

18. The administrative procedure to assign a management official to a detail involved only the preparation of POD Form 1723, "Assignment Order", signed by an official with authority over the vacant position; the normal procedure is to detail an employee for a period not to exceed 89 days, but the detail may be extended by another Form 1723.

19. From August 1966 to JEP in March 1973, there were only four positions higher than plaintiff's position in the Washington, D.C. Post Office: Director, Installation Services (PFS-17); Assistant Director, Operations Division for Distribution (PFS-16); Director, Operations Division (PFS-17); and Postmaster or Officer-in-Charge (PFS-18).

20. The following white person was detailed into the position of Director, Installation Services: L.M. Lieb (7/26/71), (10/26/71), (9/9/72 until retirement in December 1973).

21. The following white persons were detailed and/or promoted into the position of Assistant Director, Operations Division for Distribution: L.M. Lieb, (5/4/71), (11/14/71); E.C. Ray, (7/26/71), (10/22/71); F.A. Miller, (5/26/73), 8/24/73), (11/21/73); M.G. Thomas, (2/17/73), (5/17/73); D.M. Barranca, (11/6/71), (9/8/72), (12/6/72); L.V. Bateman, Jr., (2/21/70).

22. The following white persons were detailed and/or promoted into the position of Director, Operations Division: D.M. Barranca, (2/17/73), (5/17/73), (8/15/73), (11/12/73); E.H. Rapee (detailed 5/4/71 until promotion on 3/4/72), (3/4/72-6/23/72); E.C. Ray (6/24/72), (9/24/72), (12/23/72).

23. E.H. Rapee was detailed into the position of Officer-In-Charge on June 24, 1972.

24. Subsequent to JEP, the following white persons were detailed and/or promoted to positions at the following levels higher than plaintiff's level (PES-20): F.A. Miller (PES-22); C. Errico (PES-26); M.G. Thomas (PES-26); D.J. Robertson (PES-24); A.J. Eckerl (PES-21); J.J. Spelta (PES-23); W.E. Hahn (PES-22).

25. From July 1971, when C.G. Beall vacated the postmaster's position, until JEP in March 1973, there was only one promotion board (February 1972) for the positions of Director, Operations Division, and Assistant Director, Operations Division for Distribution, resulting in E.H. Rapee's promotion to Director, Operations Division (PFS-17) and in L.M. Lieb's promotion to Assistant Director, Operations Division for Distribution (PFS-16) on March 4, 1972.

26. For both of the positions described in paragraph 25, the plaintiff was the second choice of the Promotion Advisory Board, with the selections being forwarded to the Officer-In-Charge on February 25, 1972.

27. On November 6, 1971, D.M. Barranca (PFS-14) was detailed to the position of Acting Assistant Director, Operations Division for Distribution. On February 25, 1972, a promotion advisory board ranked Mr. Barranca third behind plaintiff.

28. On May 4, 1971, L.M. Lieb (PFS-13) was detailed to Acting Assistant Director, Operations Division for Distribution for approximately 3 months, then subsequently detailed to Acting Director, Installation Services (PFS-16) twice until November 14, 1971, when he was again detailed to Acting Assistant Director, Operations

Division for Distribution, thus enhancing his experience in higher level jobs.

29. On May 4, 1971, E.H. Rapee (PFS-15) was detailed to Acting Director, Operations Division, where he remained until his promotion to that same position on March 4, 1972, thus gaining the experience for the job.

30. Both L.M. Lieb and E.H. Rapee subsequently were detailed to new jobs within a short period of time after their promotions of March 4, 1972; L.M. Lieb was again detailed on September 9, 1972, to Acting Director, Installation Services, where he remained until his retirement in December 1973, and E.H. Rapee was detailed to the position of Officer-In-Charge on June 24, 1972, where he remained until January 1974.

31. On September 8, 1972, D.M. Barranca was detailed to the position of Assistant Director, Operations Division for Distribution; this was only six months after he had been selected below plaintiff for that position by the Promotion Advisory Board.

32. The Washington, D.C. Post Office did not post or solicit interested personnel to fill details; individuals were selected by higher level supervisors.

33. Mr. E.H. Rapee believed that postal experience was the predominant qualification factor considered for detail or promotion.

34. In July 1972, Carlton Beall nominated three persons for the Postmaster position, none of whom was the plaintiff.

35. The Regional Office added the plaintiff's name as a candidate for Postmaster in 1972, feeling he was qualified for the position.

36. After plaintiff's name was added in 1972 as a candidate, the list of four names was never submitted to the selection board for a period of nine months while plaintiff was eligible for consideration.

37. On March 3, 1973, plaintiff's position, Assistant Director, Operations Division for Transit Mails, was ranked at PES-20.

38. As a result of plaintiff's position being ranked at PES-20, he was no longer eligible for the position of Postmaster, Washington, D.C.

39. Carlton Beall submitted the same three names again in July 1973, after JEP had reduced plaintiff's position level below that eligible for consideration as a candidate for Postmaster.

40. In the 19 months preceding January 4, 1974, E.H. Rapee was detailed to the position of Officer-In-Charge, City Post Office, Washington, D.C. and he was Beall's first selection for the Postmaster position.

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SUPREME COURT OF THE UNITED STATES

No. 81-1044

UNITED STATES POSTAL SERVICE BOARD OF GOVERNORS, PETITIONER

v.

LOUIS H. AIKENS

ORDER ALLOWING CERTIORARI

Filed March 22, 1982

The petition herein for a writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit is granted.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1982 373804 694

Opposition

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No. 81-1044

IN THE
Supreme Court of the United States

OCTOBER TERM, 1981

UNITED STATES POSTAL SERVICE
BOARD OF GOVERNORS,

Petitioner,

v.

LOUIS H. AIKENS

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit

---

RESPONDENT'S BRIEF IN OPPOSITION

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PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D.C.

QUESTION PRESENTED

Whether a Postal Service employee, in order to establish a *prima facie* case of employment discrimination in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e et seq., must show more than the fact that he was black, that he continually sought promotion to higher level jobs for which he was qualified when they became available, and that the Postal Service always selected white employees for the positions.

TABLE OF CONTENTS

	Page
STATEMENT	1
REASONS FOR DENYING THE PETITION	1
CONCLUSION	4

TABLE OF AUTHORITIES

CASES:

Hagans v. *Andrus*, 651 F.2d 622, cert. denied, No. 81-41 (Oct. 5, 1981) 2, 3

McDonnell Douglas Corp. v. *Green*, 411 U.S. 792 (1973) . 2, 3

Olson v. *Philco-Ford*, 531 F.2d 474 (10th Cir. 1976) 2, 3

Texas Department of Community Affairs v. *Burdine*, 450 U.S. 248 (1981) 1, 2, 4

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981
No. 81-1044

UNITED STATES POSTAL SERVICE
BOARD OF GOVERNORS,

Petitioner,

v.

LOUIS H. AIKENS

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit

---

RESPONDENT'S BRIEF IN OPPOSITION

STATEMENT

The facts of the case are stated fully in the decision of the Court of Appeals (Petitioner's Appendix E, at 17a-24a).[1]

REASONS FOR DENYING THE PETITION

Once again, the petitioner argues that the holding of the court below in this case is inconsistent with this court's decision in *Texas Department of Community Affairs* v. *Burdine*, 450 U.S. 248 (1981), because the elements identified by the court of appeals are insufficient in the context to show that the plaintiff "was rejected under circumstances which give rise to an inference of unlawful discrimination" (*id.* at 253). In the accompanying footnote (*id.* at 254, n.6), this court stated that it had described an appropriate model for a prima facie case of racial

---

[1] All further references to Petitioner's Appendices will be noted as "App."

discrimination in *McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792 (1973). In the last paragraph of the footnote, this court then stated:

> In the instant case, it is not seriously contested that respondent has proved a prima facie case. She showed that she was a qualified woman who sought an available position, but the position was left open for several months before she was finally rejected in favor of a male who had been under her supervision.

The very next sentence after the reference in the main text to footnote 6 then states: "The prima facie case serves an important function in litigation: it eliminates the most common nondiscriminatory reasons for the plaintiffs rejection." This court then went on to say that the "prima facie case raises an inference of discrimination."

Thus, in *Burdine*, this court indicated that the four-pronged test of *McDonnell Douglas* was appropriately used as a model to establish a prima facie case, which thereby raised an inference of discrimination.

In the instant case, the court of appeals has twice issued very reasoned opinions, both of which emphasized the flexibility of the *McDonnell Douglas* criteria and followed the reasoning of *Burdine*. In fact, in the most recent decision, the court may have gone farther than necessary in remanding to determine the "qualifications" of the respondent. Petitioner has never contested the fact that Aikens was qualified for the positions (Petition, p. 10)

Petitioner's emphasis on the "rejection element" of the *McDonnell Douglas* test and its use of *Hagans* v. *Andrus*, 651 F.2d 622 (9th Cir.), cert. denied, No. 81-41 (Oct. 5, 1981) and *Olson* v. *Philco-Ford*, 531 F.2d 474 (10th Cir. 1976) to support its argument is deceptive. Neither *Hagans* nor *Olson* is comparable on its facts to the instant case. The facts in the instant case are closer to *Burdine* than either *Hagans* or *Olson*. Both of those

cases involved a number of qualified candidates competing, *and being considered,* for *one* position. The controlling issue was whether the selection of a qualified man over a qualified woman, standing alone, makes out a prima facie case of sex discrimination. A close reading of *Hagans* and *Olson* will not indicate any conflict with the instant case, they merely demonstrate the flexibility of the *McDonnell Douglas* test when utilized as a model where there are differing fact patterns.

In their petition, the Postal Service emphasized that *numerous minimally qualified candidates* may have applied for a single job, thus rejection of a minority, standing alone, should not give rise to an inference of discrimination. The petition sets forth a number of facts out of context, some of which are contrary to the undisputed evidence in the record. One of the reasons for the original appeal of the trial court's decision was that the findings of fact were either unsupported by, or contrary to, the evidence. This was primarily because of the trial court adopted almost wholesale the proposed findings of fact submitted by the Postal Service. This issue was not addressed by the court of appeals except where related to Aikens' qualifications.

The record shows that the "something more" which petitioners feels should be required under *Hagans* and *Andrus* is, in fact, there. Contrary to petitioner's claim at p. 11, n.7, there is undisputed evidence in the record that there was a failure generally to promote blacks until *shortly before* respondent filed his claim, that respondent was *continually* passed over for a promotion or detail, and that there had been racially derogatory remarks by the Postmaster/District Manager.

The record also shows that Aikens was not even *considered* for promotion or details to *higher* level jobs until after he had filed his EEO complaint. In one of the positions at issue in the instant case, D. M. Barranca was detailed to the position of Acting Director, Operations Division. This was in spite of the fact that he had been ranked behind Aikens by a promotion

board for that position and the position of Assistant Director, Operations Division for Distribution. Barranca had been detailed to the latter position prior to his being detailed to the position at issue and subsequent to the promotion board decision.

There is nothing to show that the above factors were not taken into consideration by the court of appeals. The decision below does not, in any way, conflict with the decision in *Burdine*. Indeed, it is in full accord with principles expressed in decisions of this court.

CONCLUSION

For the reasons set forth above the petition for certiorari should be denied.

Respectfully submitted,

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February, 1982

Petitioner's Brief

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No. 81-1044

In the Supreme Court of the United States

OCTOBER TERM, 1981

UNITED STATES POSTAL SERVICE
BOARD OF GOVERNORS, PETITIONER

v.

LOUIS H. AIKENS

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE PETITIONER

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QUESTION PRESENTED

Whether a Postal Service employee who showed only that he was black, that he had applied for a promotion for which he possessed the minimum qualifications, and that the Postal Service selected another, non-minority, applicant, established a prima facie case of employment discrimination in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.*

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statute involved	2
Statement	2
Summary of argument	8
Argument:	
An employer's selection of a qualified white applicant for a position instead of a qualified black applicant does not, without more, establish a prima facie case of employment discrimination	11
A. Such a selection does not raise an inference of racial discrimination	11
B. Requiring more than a showing that a qualified nonminority applicant was chosen over a qualified minority applicant is not unfair to plaintiffs and avoids placing unwarranted burdens on employers	21
1. A plaintiff has ample alternative means of establishing a prima facie case	21
2. A defendant should not be required to present a defense in an employment discrimination action unless the plaintiff shows more than the court of appeals required	30
Conclusion	35

TABLE OF AUTHORITIES

Cases:	Page
Alexander v. *Gardner-Denver Co.*, 519 F.2d 503, cert. denied, 423 U.S. 1058	17
Bolling v. *Sharpe*, 347 U.S. 497	24
Brown v. *General Services Administration*, 425 U.S. 820	24

Cases—Continued Page

Bundy v. *Jackson*, 641 F.2d 934 ..... 14, 20
Burdine v. *Texas Department of Community Affairs*, 647 F.2d 513 33
Causey v. *Ford Motor Co.*, 516 F.2d 416 25
Chandler v. *Roudebush*, 425 U.S. 840 4
Chavez v. *Temple Union High School District No. 213*, 565 F.2d 1087 17
Contractors Association of Eastern Pennsylvania v. *Secretary of Labor*, 442 F.2d 159, cert. denied, 404 U.S. 854 22
Crawford v. *Western Electric Co.*, 614 F.2d 1300 25
Davis v. *Califano*, 613 F.2d 957 24
Daye v. *Harris*, 655 F.2d 258 ..... 14, 16
Dinnan, In re, 661 F.2d 426, cert. denied, No. 81-1714 (June 7, 1982) 29
Donaldson v. *Pillsbury Co.*, 554 F.2d 825, cert. denied, 434 U.S. 856 24
East v. *Romine, Inc.*, 518 F.2d 332 32-33
EEOC v. *Associated Dry Goods Corp.*, 449 U.S. 590 . 27
Flowers v. *Crouch-Walker Corp.*, 552 F.2d 1277 . 18, 23, 28
Furnco Construction Corp. v. *Waters*, 438 U.S. 567 ..... 19, 20, 23, 29
Griggs v. *Duke Power Co.*, 401 U.S. 424 21
Hagans v. *Andrus*, 651 F.2d 622, cert. denied, 454 U.S. 859 ..... 14, 25
Hazelwood School District v. *United States*, 433 U.S. 299 24
International Brotherhood of Teamsters v. *United States*, 431 U.S. 324 ..... 13, 15, 17, 24
International Union of Electrical Workers v. *NLRB*, 648 F.2d 18 25
Johnson v. *University of Pittsburgh*, 435 F. Supp. 1328 32, 33
Jordan v. *Dellway Villa*, 661 F.2d 588 16
Kunda v. *Muhlenberg College*, 621 F.2d 532 25
Kyriazi v. *Western Electric Co.*, 465 F. Supp. 1141 .. 16
Lieberman v. *Gant*, 630 F.2d 60 ..... 17, 28, 32, 34
McDonald v. *Sante Fe Trail Transportation Co.*, 427 U.S. 273 16

Cases—Continued Page

McDonnell Douglas Corp. v. *Green*, 411 U.S. 792 ..... 6, 9, 20, 22, 23, 24, 29, 30, 31, 32
Meyer v. *Missouri State Highway Commission*, 567 F.2d 804, cert. denied, 435 U.S. 1013 17
Mortensen v. *Callaway*, 28 Empl. Prac. Dec. (CCH) 24352 14
Morton v. *Mancari*, 417 U.S. 535 24
Olson v. *Philco-Ford*, 531 F.2d 474 14
Parker v. *Baltimore & O. R.R.*, 652 F.2d 1012 .. 14, 16, 18
Peters v. *Jefferson Chemical Co.*, 516 F.2d 447 17
Pettit v. *United States*, 488 F.2d 1026 ..... 14, 25
Pond v. *Braniff Airways, Inc.*, 500 F.2d 161 29
Powell v. *Syracuse University*, 580 F.2d 1150, cert. denied, 439 U.S. 984 23
Scott v. *University of Delaware*, 601 F.2d 76, cert. denied, 444 U.S. 931 29
Shack v. *Southworth*, 521 F.2d 51 29
Taylor v. *Philips Industries, Inc.*, 593 F.2d 783 28
Texas Department of Community Affairs v. *Burdine*, 450 U.S. 248 ..... *passim*
United States v. *Lee Way Motor Freight, Inc.*, 625 F.2d 918 28
Valentino v. *United States Postal Service*, 674 F.2d 56 ..... 14, 23, 24
Village of Arlington Heights v. *Metropolitan Housing Development Corp.*, 429 U.S. 252 24
Vuyanich v. *Republic National Bank*, 505 F. Supp. 224 33
Wright v. *National Archives & Records Service*, 609 F.2d 702 25

Statutes, regulations and rule:

Civil Rights Act of 1964, Title VII, 42 U.S.C. 2000e *et seq.* 2

Section 717(a), 42 U.S.C. 2000e-16(a) 2, 4
Section 717(b), 42 U.S.C. 2000e-16(b) 2
Section 717(c), 42 U.S.C. 2000e-16(c) 4

Equal Employment Opportunity Act of 1972, Section 11, Pub. L. No. 92-261, 86 Stat. 111 (42 U.S.C. 2000e-16) 24

Statutes, regulations and rule—Continued Page

5 U.S.C. (Supp. III) 7201(b) 24
5 C.F.R. 713.214 (1974) 2

29 C.F.R.:

Section 1613.213 26
Section 1613.216 26
Section 1613.216(a) 27
Section 1613.216(b) 27
Section 1613.217 27
Section 1613.218 26
Section 1613.218(c)(2) 27
Section 1613.218(e) 26
Section 1613.221 26
Section 1613.221(b)(2) 27
Section 1613.222 27
Sections 1613.231-1613.236 26

Fed. R. Civ. P. 41(b) 31, 33

Miscellaneous:

Bartholet, *Application of Title VII to Jobs in High Places*, 95 Harv. L. Rev. 947 (1982) 13, 33
Cleary, *Presuming and Pleading: An Essay on Jusristic Immaturity*, 12 Stan. L. Rev. 5 (1959) 26
Fiss, *A Theory of Fair Employment Laws*, 38 U. Chi. L. Rev. 235 (1971) 22
H.R. Rep. No. 92-238, 92d Cong., 1st Sess. 24
McCormick's Handbook of the Law of Evidence, (2d ed. E. Cleary 1972) 18, 26
Waintroob, *The Developing Law of Equal Employment Opportunity at the White Collar and Professional Level*, 21 Wm. & Mary L. Rev. 45 (1979) 13

9 J. Wigmore, *Evidence:*

(3d ed. 1940) 18
(J. Chadbourn ed. 1981) 18, 26

In the Supreme Court of the United States

OCTOBER TERM, 1981

No. 81-1044

UNITED STATES POSTAL SERVICE
BOARD OF GOVERNORS, PETITIONER

v.

LOUIS H. AIKENS

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE PETITIONER

OPINIONS BELOW

The opinion of the district court (Pet. App. 49a-59a) is not reported. The initial opinion of the court of appeals (Pet. App. 17a-40a) is reported at 642 F.2d 514. The opinion of the court of appeals on petitions for rehearing (Pet. App. 43a-48a) is not reported. The order of this Court vacating the initial judgment of the court of appeals and remanding for reconsideration (Pet. App. 10a-14a) is reported at 453 U.S. 902. The opinion of the court of appeals on remand (Pet. App. 2a-9a) is reported at 665 F.2d 1057.

JURISDICTION

The judgment of the court of appeals (Pet. App. 1a) was entered on September 8, 1981. The petition for a writ of certiorari was filed on December 4, 1981, and granted on March 22, 1982 (J.A. 12). The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATUTE INVOLVED

Section 717(a) of the Civil Rights Act of 1964, 42 U.S.C. 2000e-16(a), provides in relevant part:

> All personnel actions affecting employees or applicants for employment * * * in executive agencies * * *, in the United States Postal Service and the Postal Rate Commission, * * * shall be made free from any discrimination based on race, color, religion, sex, or national origin.

STATEMENT

1. Respondent, a black man and a retired employee of the United States Postal Service in Washington, D.C., charged that the Postal Service denied him certain promotions and details because of his race, in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.* He filed an administrative complaint with the Postal Service in 1974. The Postal Service conducted an extensive investigation that included several informal efforts at conciliation and a three-day hearing before a Complaints Examiner (Pet. App. 51a). The Complaints Examiner received evidence from the Postal Service officials who made the decision to deny respondent the four promotions and details at issue, [1] and he summarized their

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[1] At the time respondent filed his charge, Civil Service regulations issued under Section 717(b) of the Civil Rights Act, 42 U.S.C. 2000e-16(b), required that an administrative complaint be filed within 30 days of an alleged violation. 5 C.F.R. 713.214 (1974). The district court ruled that respondent filed a timely complaint only with regard to details and promotions to four positions—Mail Processing Officer, Acting Mail Processing Representative, Director of the Operations Division, and Customer Services Representative (Pet. App. 50a). Although much of the evidence presented at the trial concerned respondent's allegation that he was discriminatorily denied a promotion to the position of Postmaster, and the district court made findings on the merits of this claim and resolved it adversely to

explanations in his report (The Findings and Recommended Decision in the Discrimination Complaint of: Louis H. Aikens at 5 (Nov. 12, 1975)):[2]

> The alleged discriminating officials, Messrs. Beall and Rapee, both stated that the reason that complainant was not detailed and/or promoted * * * was that he indicated to each of them at various times that he was only interested in an administrative services position * * * which was continuously occupied, or the Postmaster's position, and that he was not interested in such positions as Director of Finance, Director of Personnel and Tour Superintendent * * *. [A]ccording to Mr. Beall, serving in these positions would have enhanced complainant's career and future recompense because he would have acquired a broader background in postal affairs. * * * A broader background would have stood complainant in good stead, in Mr. Beall's opinion, for selection to other details and/or promotions.

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respondent—noting, for example, that a black candidate was selected (Pet. App. 54a-57a)—the district court apparently considered this claim time-barred as well (*id.* at 50a). The district court also noted that respondent "was aware of the * * * complaints process [because h]e was chairman of the Postmaster's E.E.O. [Equal Employment Opportunity] Committee for a period of three years, and at the time he filed his complaint he had been the E.E.O. Administrative Officer for the District of Columbia Post Office for approximately two years" (*id.* at 50a-51a).

The court of appeals affirmed the district court's ruling that respondent filed a timely complaint only with regard to the four positions (Pet. App. 19a-20a & nn.1, 2). This Court declined to review that aspect of the court of appeals' decision. 453 U.S. 912 (1981).

[2] In the record this document is appended to the Decision of the United States Civil Service Commission Appeals Review Board (Jan. 13, 1977).

The Complaints Examiner recommended a finding that respondent had not been discriminated against; the Postal Service accepted his recommendation. Respondent appealed to the Civil Service Commission, and the Commission's Appeals Review Board affirmed the decision of the Postal Service. Its opinion similarly stated that respondent's refusal to accept certain positions that would have broadened his experience "played a major role in the minds of the selecting officials" (Decision of the United States Civil Service Commission Appeals Review Board at 4 (Jan. 13, 1977)).

2. Respondent then sued the Postal Service in the United States District Court for the District of Columbia. See 42 U.S.C. 2000e-16(c); *Chandler* v. *Roudebush*, 425 U.S. 840 (1976). He alleged a violation of Section 717(a) of the Civil Rights Act, 42 U.S.C. 2000e-16(a), and sought retroactive promotions, back pay, and other relief (Pet. App. 50a).

After a two-day trial at which both sides presented evidence, the district court entered judgment against respondent (Pet. App. 61a). The Postal Service did not deny that respondent, along with several other employees, had the qualifications needed to be eligible for the promotions and details in issue. There was also no dispute that the Postal Service selected white employees for those promotions and details instead of respondent. The district court found, however, that during the period covered by respondent's complaint, "there was a considerable increase in the number of black employees occupying high level positions in the District of Columbia Post Office" (*id.* at 53a). The court also found that during that period, "other blacks as well as whites were promoted or detailed to positions above" respondent's *(ibid.)*. At the time of the district court's opinion—February 1979—"almost all high level positions [were] held by blacks" *(ibid.)*.

The district court also found (Pet. App. 51a-52a)—and the court of appeals specifically agreed (*id.* at 18a)—that from 1952 to 1966 respondent advanced steadily through a succession of supervisory positions in the Post Office. Between 1966 and 1973, respondent was offered, but declined, several promotions and lateral transfers that would have helped him obtain promotions (*id.* at 52a-53a). Nonetheless, by March 1973, respondent was the fifth highest ranking official in the Washington, D.C., Post Office (*id.* at 52a). Moreover, the district court found that respondent introduced "no evidence of specific acts of discrimination against him" (*id.* at 54a) and no other direct "evidence that he was treated any differently because of his race" (*id.* at 53a). Finally, the district court found that respondent "produced no credible evidence that he was as qualified or more qualified than other individuals who were detailed or promoted during the period in question" (*id.* at 54a). For this reason, the district court held that respondent had "failed to present a *prima facie* case of racial discrimination" (*id.* at 59a).[3]

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[3] The district court's finding that respondent failed to establish a prima facie case differed from its initial view. During the trial, at the close of respondent's case, the Postal Service moved to dismiss the complaint on the ground that respondent had failed to establish a prima facie case. Tr. 256; see Pet. App. 47a. The district court denied this motion, saying that "while it certainly is not the strongest case I have ever heard, I think he just gets under the wire" (Tr. 259). The government then introduced its evidence. When the district court entered its formal findings of fact, however, it had apparently reconsidered, and it explicitly ruled that respondent failed to establish a prima facie case.

Certain portions of the district court's opinion can plausibly be read to hold that even if respondent did establish a prima facie case, the government rebutted it and respondent did not carry his ultimate burden of proving racial discrimination. See Pet. App. 58a-59a; *id.* at 47a-48a (opinion of Wilkey, J., on petitions for rehearing). But the

3. The court of appeals did not overturn any of the district court's findings of fact, but by a 2-1 vote it reversed. The panel majority quoted the elements of a Title VII prima facie case first specified in *McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792, 802 (1973) (Pet. App. 21a):

> [A] prima facie case of racial discrimination [may be established] by showing (i) that [the plaintiff] belongs to a racial minority; (ii) that he applied and was qualified for a job for which the employer was seeking applicants; (iii) that, despite his qualifications, he was rejected; and (iv) that after his rejection, the position remained open and the employer continued to seek applicants from persons of complainant's qualifications.

The court of appeals then declared that "it is clear that [respondent] met the first, third and fourth elements of the test set forth in *McDonnell Douglas:* he is a black man; he sought promotion to higher level positions that became available; and white Post Office employees received the positions" (Pet. App. 21a-22a). The court of appeals therefore addressed only the question whether respondent was qualified for the positions in issue. The court of appeals concluded that the district court erroneously believed the second element of the *McDonnell Douglas* test to require a claimant to show that he was as qualified or more qualified than the persons hired in his stead. In fact, the court of appeals said, all that was required was that a claimant be qualified; and the court ruled, on the basis of its examination of the record, that respondent had shown that he was qualified for the positions in issue (Pet. App. 22a-26a).

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court of appeals expressly rejected this reading of the district court's opinion (*id.* at 44a-45a) and instead interpreted the opinion as holding simply that respondent failed to establish a prima facie case. We do not now challenge this interpretation of the district court's holding.

The court of appeals accordingly held that respondent had established a prima facie case (Pet. App. 28a). It remanded for further proceedings at which "the government is * * * to be given the opportunity to offer the required proof concerning the legitimacy of the promotion decisions here in issue" (*id.* at 27a).[4]

This Court then granted our petition for a writ of certiorari, vacated the judgment of the court of appeals, and remanded the case to that court for further consideration in light of *Texas Department of Community Affairs* v. *Burdine*, 450 U.S. 248 (1981). Two Justices dissented (Pet. App. 10a-14a). On remand, the court of appeals again proceeded from the premise that only the second element of the *McDonnell Douglas* test—requiring respondent to show that he was qualified for the position he sought—was in issue (*id.* at 6a).[5] The court of appeals also adhered to its ruling that the district court erred in holding that respondent failed to establish a prima facie case

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[4] Judge Wilkey, in dissent, criticized the majority for considering only "minimal objective criteria for qualifications" (Pet. App. 37a) instead of "comparative criteria" (*id.* at 36a); the latter, he said, were more suited to evaluating employers' decisions to hire and promote managerial employees (*id.* at 38a). He would have remanded the case to the district court for a finding on respondent's qualifications "based on relative as well as absolute criteria of qualification" (*id.* at 40a).

[5] In our petition, we acknowledged that respondent possessed the minimum qualifications for the positions in issue (80-1737 Pet. I, 4, 7, 9). We argued that the court of appeals' error was finding a prima facie case when respondent failed to show any circumstance comparable to the *fourth* element of the *McDonnell Douglas* test (80-1737 Pet. 5, 7)—that is, any " 'circumstances which give rise to an inference of unlawful discrimination' " (*id.* at 7, quoting *Texas Department of Community Affairs* v. *Burdine*, *supra*, 450 U.S. at 253). The court of appeals did not request briefing or argument after this Court's remand.

(ibid.), although it modified its earlier opinion by stating that in order to establish a prima facie case, a plaintiff must show more than that he "possesses the absolute minimum qualifications for a job * * *; if the employer has indicated that certain additional qualifications are necessary or preferred, the plaintiff must demonstrate that he has those qualifications as well" *(ibid.)*.[6] Instead of finding that respondent had established a prima facie case, the court of appeals concluded that the district court "did not make findings on [respondent's] qualifications clear enough to permit us to determine if a prima facie case was established" (*id.* at 8a). The court of appeals accordingly ordered a remand to the district court (*id.* at 9a).

SUMMARY OF ARGUMENT

A. Respondent showed only that he was a qualified black applicant for a position, and that a white applicant who was at least as qualified was selected instead. The court of appeals held, both before and after this Court's remand, that such a showing is sufficient to establish a prima facie case of employment discrimination. This holding produces unacceptable results and is inconsistent with the principle that, in order to establish a prima facie case, a plaintiff must introduce evidence that "give[s] rise to an inference of unlawful discrimination" (*Texas Department of Community Affairs* v. *Burdine*, 450 U.S. 248, 253 (1981)).

1. Frequently, an employer will fill a vacancy by selecting from a group of qualified applicants. Whenever that group includes persons of different races—or sexes,

[6] In this opinion, the court of appeals repeatedly referred to the district court's "grant of summary judgment" in favor of the Postal Service (Pet. App. 2a; see *id.* at 3a, 9a). In fact, the district court entered judgment only after a full trial. See pages 5-6 note 3, *supra*.

religions, or national origins—at least one disappointed applicant will be able to show what respondent showed here: that he was qualified for the position he sought, and that a person of a different group received the position instead. Certainly if the disappointed applicant is a member of a minority group, and perhaps even if he is not, he will, under the court of appeals' approach, be able to establish a prima facie case of discrimination. Thus if the court of appeals' ruling stands, *every* employment decision made by selecting from a heterogeneous group of qualified applicants will automatically give rise to one—and frequently to more than one—prima facie case of employment discrimination.

2. This result, undesirable on its face, is also inconsistent with this Court's previous decisions. This Court has specified that in order to prove a prima facie case, a plaintiff must show circumstances giving rise to an inference of discrimination. But employers who do not discriminate can legitimately choose a qualified white over a black who is equally or less qualified; such a choice—unaccompanied, as it was here, by any suspicious circumstances—does not suggest that a discriminatory purpose was at work. The most that can be said of such a choice is that it leaves open the possibility that the employer may have discriminated; it falls markedly short of the showing of a probability of discrimination needed to establish a prima facie case.

B. 1. A plaintiff who has in fact been discriminated against is likely to have many other ways of establishing a prima facie case. For example, a prima facie case would be established by a qualified minority applicant who showed that the decision to reject him was economically irrational—either because it left open a vacancy (as in *McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792 (1973)) or because the employer chose a less qualified candidate

instead (as respondent unsuccessfully attempted to show here). Statistical evidence that an employer has consistently selected disproportionately few members of a minority group can also establish a prima facie case, as can a history of discrimination or anecdotal evidence showing racial prejudice. While some of this evidence will usually be in the possession of the employer, that is not a reason to excuse the plaintiff from introducing it as part of his prima facie case; the plaintiff can obtain it readily through discovery, or through the extensive administrative investigation to which he is entitled. Respondent, however, did not show either a pattern of discrimination or particular discriminatory acts.

In addition, respondent was told the Postal Service's reasons for not promoting him during the administrative investigation of his case. In general, Title VII plaintiffs will be able to ascertain the reason for the allegedly discriminatory decision either through the administrative process or by discovery. Once they learn that reason, they can establish a prima facie case by showing that it is a pretext. Moreover, in some circumstances, an employer's unjustified failure to provide a reason when it is properly requested during discovery or the administrative investigation may itself complete a qualified minority applicant's prima facie case. But respondent was provided a reason well before trial, and he failed to show that it was a pretext.

2. The court of appeals' approach also imposes excessive burdens on Title VII defendants, and on the courts that try Title VII actions. As a practical matter, if a plaintiff is held to have established a prima facie case—and thus survives a motion to dismiss made after his case-in-chief—the defendant must do more than articulate a reason for its action; the defendant must instead present *all* the evidence that supports its decision, in

order to protect against the possibility that the judge will find its reason to be a pretext. This evidence will often consist of a detailed examination of the comparative qualifications of the plaintiff and the successful candidate. Particularly when, as in many managerial, professional, or government jobs, the basis for the selection is not easily quantified, the defense of the employment decision can be laborious and time-consuming. These burdens can be avoided, however, only if the plaintiff is held not to have established a prima facie case.

If the plaintiff has genuinely raised an inference of discrimination, the employer should of course be required to defend its action. But an employer should not be subject to being compelled to present a full-scale defense of its decision every time it chooses from a heterogeneous group of qualified applicants; and that is what the court of appeals' decision effectively requires.

ARGUMENT

AN EMPLOYER'S SELECTION OF A QUALIFIED WHITE APPLICANT FOR A POSITION INSTEAD OF A QUALIFIED BLACK APPLICANT DOES NOT, WITHOUT MORE, ESTABLISH A PRIMA FACIE CASE OF EMPLOYMENT DISCRIMINATION

A. Such a Selection Does Not Raise an Inference of Racial Discrimination

1. Respondent established that he was a qualified black applicant for the positions in issue, and that a white applicant received each position instead. But respondent established nothing more. He did not show, for example, that the Postal Service systematically treated whites more favorably than blacks; on the contrary, the district court explicitly found that the number of blacks in high-level positions at the Washington, D.C. Post Office increased during the period of the alleged discrimination

against respondent. The district court also found that both blacks and whites were promoted to positions above respondent's during that time. Nor did respondent show a history of discrimination at the Post Office; respondent himself had been promoted (or offered promotions or other new positions) steadily after 1952. The court of appeals, although ruling in respondent's favor, similarly found "no indication that [respondent] was adversely affected by an employment policy or practice that consistently operated to hold him, or blacks as a class, in the lower echelons of employment" (Pet. App. 19a-20a n.1).

The district court also found no direct evidence of racial discrimination by the officials responsible for denying respondent the positions he sought; that finding, too, was undisturbed on appeal.[7] Respondent did not show that the white employees who received the promotions he sought were less qualified than he. Finally, the officials responsible for the challenged promotions and details provided reasons for their actions even before the trial began; those reasons were reflected in the Postal Service's explanation of its decision not to grant relief to respondent, and respondent did not show that those proffered reasons were implausible or a pretext for racial discrimination.

In short, respondent showed only that he was a qualified black applicant, and that white applicants who were no less qualified received the positions he sought. The district court correctly held that this showing was insufficient to establish a prima facie case. But the court of

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[7] While respondent has asserted that there was evidence of racially derogatory remarks by a supervisor (Br. in Opp. 3), the district court's findings reflect no such evidence, and the court of appeals did not rely on—or even mention—any such evidence in overturning the district court's holding that respondent failed to establish a prima facie case.

appeals disapproved that holding, both before and after the remand from this Court. The court of appeals' opinions obscure the issue somewhat, because they focus on respondent's qualifications; the opinion issued after this Court's remand unaccountably complicates the "qualifications" element of the *McDonnell Douglas* prima facie case.* But what is at issue here is not respondent's qualifications—which the Postal Service does not

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*In its opinion after the remand from this Court, the court of appeals appeared to hold that, in order to establish a prima facie case, respondent would have to "demonstrate[] that his rejection did not result from 'an absolute or relative lack of qualifications' " (Pet. App. 8a, quoting *International Brotherhood of Teamsters* v. *United States*, 431 U.S. 324, 358 n.44 (1977)). But the district court found that respondent was not as well qualified or better qualified than the successful applicants (Pet. App. 54a, 59a), and the court of appeals did not declare that finding to be clearly erroneous. It is therefore unclear why the court of appeals thought further proceedings were needed to determine if respondent was rejected because of a "relative lack of qualifications."

At another point in its second opinion, however, the court of appeals indicated that it was modifying its earlier opinion only to the extent of holding that a plaintiff "may be required to go beyond a showing of minimum qualifications to demonstrate that he possesses whatever qualifications or background experiences the employer has indicated are important" (Pet. App. 8a; see *id.* at 6a). This passage appears to refer not to the distinction between absolute and relative qualifications but to a separate distinction between objective and subjective qualifications.

We agree with the court of appeals (Pet. App. 7a) that defining the qualifications for professional and managerial positions raises difficulties often not encountered in defining the qualifications of blue-collar workers. See generally Pet. App. 32a-40a (Wilkey, J. dissenting); Bartholet, *Application of Title VII to Jobs in High Places*, 95 Harv. L. Rev. 947 (1982); Waintroob, *The Developing Law of Equal Employment Opportunity at the White Collar and Professional Level*, 21 Wm. & Mary L. Rev. 45 (1979). But these questions

question—but the court of appeals' adherence to its view, apparently now well established in the District of Columbia Circuit,[9] that a qualified black applicant estab-

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are not presented here because, as the case comes to this Court, respondent's qualifications, however defined, are not in issue; we do not contend that respondent was unqualified for the positions he sought, and respondent has failed to show that he was better qualified than those who were selected. See also page 23 note 18, *infra*.

[9] In *Bundy* v. *Jackson*, 641 F.2d 934, 951 (1981), for example, the District of Columbia Circuit stated:

> [T]o make out a prima facie case the plaintiff must show that she belongs to a protected group, that she was qualified for and applied for a promotion, that she was considered for and denied the promotion, and that other employees of similar qualifications who were not members of the protected group were indeed promoted at the time the plaintiff's request for promotion was denied.

Accord, *Valentino* v. *United States Postal Service*, 674 F.2d 56, 63 (D.C. Cir. 1982); *Daye* v. *Harris*, 655 F.2d 258, 262 n.11 (D.C. Cir. 1981); *Parker* v. *Baltimore & O. R.R.*, 652 F.2d 1012, 1017 (D.C. Cir. 1981).

The court of appeals of at least two circuits have rejected the District of Columbia Circuit's approach. *Hagans* v. *Andrus*, 651 F.2d 622, 626 (9th Cir.), cert. denied, 454 U.S. 859 (1981); *Olson* v. *Philco-Ford*, 531 F.2d 474 (10th Cir. 1976). But see *Mortensen* v. *Callaway*, 28 Empl. Prac. Dec. (CCH) 24352, 24353 (10th Cir. Mar. 18, 1982). The Court of Claims has also specified that a qualified minority applicant proves a prima facie case by showing that "the supervisory level employees having responsibility to exercise judgment under the promotion system betrayed in other matters a predisposition towards discrimination against members of the involved minority." *Pettit* v. *United States*, 488 F.2d 1026, 1033 (1973). In *Olson*, the Tenth Circuit remarked (531 F.2d at 478): "To make a prima facie case in a situation such as that before us something more is needed than proof that a qualified male was chosen over a qualified female. If nothing more is needed, we have indeed opened Pandora's box."

lishes a prima facie case merely by showing that a no less qualified white applicant was preferred for the position. [10]

2. This case, therefore, concerns the common situation in which an employer has one vacancy to fill and chooses from among several qualified applicants. The facts of this case provide a typical example: an employer intends to fill a position by promotion, and several employees who apply for the promotion have performed adequately in their jobs and otherwise have the necessary experience and qualifications for the promotion. In another common situation, an employer first compiles a list of several applicants, all of whom are qualified, and then chooses one applicant from the list on the basis of a more detailed inquiry into the candidates' abilities.

In any such situation, the court of appeals would require a finding of a prima facie case whenever a black, a woman, or a member of another racial, religious, or ethnic minority was among the qualified applicants, and a person of a different race or sex was selected. The disappointed applicant would be able to show that he was qualified, that he applied for an available position, and that a member of a different group was selected instead; that is the court of appeals' definition of a prima facie case. See page 14 note 9, *supra*. If an employer's pool of qualified applicants is large and heterogeneous, a single employment decision will, therefore, automatically enable many disappointed applicants to establish a prima facie

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[10] Respondent alleged that he was the victim of intentional discrimination, and both the district court and the court of appeals viewed this case as one of "disparate treatment," not "disparate impact." See *Texas Department of Community Affairs* v. *Burdine*, *supra*, 450 U.S. at 252 n.5; *International Brotherhood of Teamsters* v. *United States*, *supra*, 431 U.S. at 324, 335-336 n.15. We accordingly intend our discussion of the definition of a prima facie case to apply only to claims of disparate treatment.

case.[11] And since non-minority employees are also protected by Title VII (*McDonald* v. *Sante Fe Trail Transportation Co.*, 427 U.S. 273 (1976)), it is at least arguable that *every* time an employer makes a selection from a heterogeneous group of qualified applicants, it automatically establishes a number of prima facie cases of employment discrimination against itself, no matter whom it selects.[12]

These results—and the court of appeals' definition of a prima facie case, which necessarily spawns them—cannot

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[11] Some courts apparently would permit each applicant whose prima facie case was not rebutted to receive a full back pay award, even if there were only one vacancy. See, *e.g.*, *Jordan* v. *Dellway Villa*, 661 F.2d 588, 594-595 (6th Cir. 1981); *Kyriazi* v. *Western Electric Co.*, 465 F. Supp. 1141, 1146 (D.N.J. 1979).

[12] In *Daye* v. *Harris*, 655 F.2d 258, 262 n.11 (1981), the District of Columbia Circuit held, on the basis of *McDonald* v. *Santa Fe Trail Transportation Co.*, that a white applicant could prove a prima facie case of racial discrimination by showing "that she was qualified for the position, that she was rejected, and that the defendant chose a similarly qualified applicant of another race. That she is white is no impediment to this suit * * *." But in *Parker* v. *Baltimore & O. R.R.*, 652 F.2d 1012 (1981), the District of Columbia Circuit ruled that this holding of *Daye* would apply only "when background circumstances support the suspicion that the defendant is the unusual employer who discriminates against the majority" (*id.* at 1017). The court identified several such circumstances—a disproportionately large number of minority promotions; a "racially discriminatory environment"; and "unlawful consideration of race as a factor in hiring in the past" (*id.* at 1017-1018).

In our view, it is reasonable to require any plaintiff to show comparable background circumstances. See pages 21-30, *infra*. Moreover, Title VII prohibits the federal government from discriminating on the basis of "race, color, religion, sex, or national origin." Many plaintiffs will be able to show that they belong to a "minority"—that is, a group that has been historically disadvantaged—with respect to one of these criteria.

be correct. "An employer's isolated decision to reject an applicant who belongs to a racial minority does not show that the rejection was racially based." *International Brotherhood of Teamsters* v. *United States*, 431 U.S. 324, 358 n.44 (1977). In *Texas Department of Community Affairs* v. *Burdine*, *supra*, the Court explained the essential attribute of a prima facie case as follows (450 U.S. at 253; emphasis added):

> The plaintiff must prove by a preponderance of the evidence that she applied for an available position for which she was qualified, but was rejected *under circumstances which give rise to an inference of unlawful discrimination.*

The court of appeals' approach essentially ignores the italicized phrase in this definition.[13] If abilities are distributed randomly through society, there will be a substantial number of cases in which an applicant who is not a member of a minority group can legitimately be preferred to a member of such a group. Of course, if an employer selects disproportionately few minority applicants, a rejected applicant should be able to establish a prima facie case. See pages 23-24, *infra*. But the most that can be said about the selection of a qualified non-minority applicant over a minority applicant in a single case—unaccompanied by any suspicious circumstances—is that

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[13] Even before *Burdine*, the courts of appeals generally understood that the elements specified in *McDonnell Douglas* constitute a prima facie case because they give rise to an inference of discrimination. See, *e.g.*, *Lieberman* v. *Gant*, 630 F.2d 60, 63 n.2 (2d Cir. 1980); *Meyer* v. *Missouri State Highway Commission*, 567 F.2d 804, 808 (8th Cir. 1977), cert. denied, 435 U.S. 1013 (1978); *Chavez* v. *Temple Union High School District No. 213*, 565 F.2d 1087, 1091 (9th Cir. 1977). See generally *Alexander* v. *Gardner-Denver Co.*, 519 F.2d 503, 505 (10th Cir. 1975), cert. denied, 423 U.S. 1058 (1976); *Peters* v. *Jefferson Chemical Co.*, 516 F.2d 447, 449-450 (5th Cir. 1975).

it is not inconsistent with the hypothesis that the employer has discriminated. Such a selection merely makes it possible—not probable—that the employer has discriminated; by itself, it cannot be said to "give rise to an inference of " discrimination. There is no sufficient reason for requiring the inference that every employment action that could possibly be discriminatory, is discriminatory. [14]

The premise of the court of appeals' approach appears to be that "in our present society," racial discrimination is so pervasive that every choice of a white applicant over a qualified black—even if the white is as qualified or more qualified—"justifies an inference of prejudice" (*Parker* v. *Baltimore & O.R.R.*, 652 F.2d 1012, 1017 (D.C. Cir. 1981)). We are not convinced that discrimination is so prevalent that "experience has proved that in the absence

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[14] The *McDonnell Douglas* prima facie case is "a legally mandatory, rebuttable presumption." *Texas Department of Community Affairs* v. *Burdine*, *supra*, 450 U.S. at 254-255 nn.7, 8, citing 9 J. Wigmore, *Evidence* §§ 2491, 2494 (3d ed. 1940); see *Flowers* v. *Crouch-Walker Corp.*, 552 F.2d 1277, 1283 n.4 (7th Cir. 1977). But "[a] presumption is based * * * upon the probative strength, as a matter of reasoning and inference, of the evidentiary fact." 9 J. Wigmore, *Evidence* § 2491, at 304 (J. Chadbourn ed. 1981). "[T]he most important consideration in the creation of presumptions is probability. Most presumptions have come into existence primarily because the judges have believed that proof of fact B renders the inference of the existence of fact A so probable that it is sensible and time-saving to assume the truth of fact A until the adversary disproves it." *McCormick's Handbook of the Law of Evidence* 807 (2d ed. E. Cleary 1972). Here, fact A is intentional discrimination; fact B—the prima facie case—should therefore be evidence making discrimination probable, not merely possible. Otherwise, there is no proper basis for concluding that "[i]f the trier of fact believes the plaintiff's evidence, and if the employer is silent in the face of the presumption, the court must enter judgment for the plaintiff because no issue of fact remains in the case." *Texas Department of Community Affairs* v. *Burdine*, *supra*, 450 U.S. at 254.

of any other explanation it is more likely than not that" the choice of a qualified white over an equally or less qualified black is "bottomed on impermissible considerations" (*Furnco Construction Corp.* v. *Waters*, 438 U.S. 567, 580 (1978)).

Even if discrimination were that pervasive, however, unrefined generalizations about the level of discrimination in society would not justify finding a prima facie case of discrimination in a particular case solely because the bare possibility of discrimination had been established. All employers are not equally likely to discriminate, and complete reliance on a society-wide generalization is not justified when evidence bearing on whether a particular defendant tends to discriminate—or whether a particular decision was discriminatory—can be introduced instead. As we discuss (see pages 25-30, *infra*), where such evidence exists, it will generally be available to Title VII plaintiffs. A prima facie case should, therefore, be defined in a way that attempts to identify those particular decisions which are more likely to have been discriminatory. The court of appeals did not even attempt to construct such a definition.

Moreover, while the court of appeals' approach is premised on its perception of the prevalence of discrimination, the court's approach would operate most harshly against those employers who have made efforts to bring minorities into their work force. As we have said, under the decision below, an employer who fills a vacancy from a racially (or sexually, etc.) diverse list automatically enables some disappointed applicant—certainly any minority applicant not from the group of the successful candidate—to prove a prima facie case of employment discrimination. An employer can avoid a prima facie case only if the pool of qualified applicants available to it is racially (and sexually, etc.) homogeneous. But frequently

it is those employers who have made the greatest efforts to combat the effects of discrimination—by actively recruiting minorities, by hiring minorities into positions in which they will gain the skills and experience needed for promotions, or by establishing special training programs for minorities—who will create a heterogeneous group of qualified applicants from which to choose.

3. The court of appeals relied on *McDonnell Douglas Corp.* v. *Green*, *supra*, but the contrast between *McDonnell Douglas* and this case is instructive, and supports our position. The fourth element of the *McDonnell Douglas* test identified a circumstance that gave rise to an inference of discrimination—"after [the complainant's] rejection, the position remained open and the employer continued to seek applicants from persons of complainant's qualifications" (411 U.S. at 802). The employer's decision to carry a vacancy rather than hire a qualified black or female applicant was also central to the prima facie case established by the plaintiffs in *Furnco Construction Corp.* v. *Waters*, *supra* (see 438 U.S. at 576) and *Texas Department of Community Affairs* v. *Burdine*, *supra* (see 450 U.S. at 254 n.6). [15]

The court of appeals, without addressing the issue, unjustifiably equated a decision to select a qualified white applicant over a qualified black with the decision to carry a vacancy instead of hiring a qualified black. [16] An employer who seeks employees with certain qualifications for a position has presumably decided that it is to his advantage to fill the position with such an employee. Leaving

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[15] In addition, in *Burdine* the plaintiff was denied a promotion in favor of a person who had been under her supervision. 450 U.S. at 254 n.6.

[16] The court of appeals made this equation explicit in *Bundy* v. *Jackson*, *supra*, 641 F.2d at 951.

the position vacant after a qualified candidate has applied is, on the surface, contrary to the employer's economic interests. Since ordinarily businesses do not knowingly act against their own economic interests, such behavior gives rise to a suspicion that other factors besides those that properly influence employment decisions played a role.

But an employer who chooses one qualified applicant over another who is equally or less qualified does nothing contrary to its economic interests. Even when the disappointed applicant is a member of a minority group, this is the kind of choice that an employer who does not discriminate will routinely make. See *Texas Department of Community Affairs* v. *Burdine*, *supra*, 450 U.S. at 259 ("[T]he employer has discretion to choose among equally qualified candidates, provided the decision is not based upon unlawful criteria."); *Griggs* v. *Duke Power Co.*, 401 U.S. 424, 436 (1971) ("Congress has not commanded that the less qualified be preferred over the better qualified simply because of minority origins."). Unless there is some other circumstance that gives rise to an inference of discrimination, such a choice, standing alone, does not create a prima facie case of employment discrimination.

B. Requiring More Than a Showing That a Qualified Non-Minority Applicant Was Chosen Over a Qualified Minority Applicant Is Not Unfair to Plaintiffs and Avoids Placing Unwarranted Burdens on Employers

1. A plaintiff has ample alternative means of establishing a prima facie case.

1. As we have suggested, a plaintiff who is in fact a victim of discrimination is likely to have many ways of establishing a prima facie case. A plaintiff can, for example, take advantage of the fact that discrimination is, in general, economically irrational; it is contrary to "[t]he

broad, overriding interest, shared by employer, employee, and consumer, [in] efficient and trustworthy workmanship assured through fair and racially neutral employment and personnel decisions." *McDonnell Douglas Corp.* v. *Green*, *supra*, 411 U.S. at 801. See *Contractors Association of Eastern Pennsylvania* v. *Secretary of Labor*, 442 F.2d 159, 170-171 (3d Cir.), cert. denied, 404 U.S. 854 (1971); Fiss, *A Theory of Fair Employment Laws*, 38 U. Chi. L. Rev. 235, 249-253 (1971). Consequently, a victim of discrimination will sometimes be able to show that the decision he challenges was contrary to the employer's economic interests, and—as we have discussed in connection with *McDonnell Douglas* itself—such a showing should generally be sufficient to raise an inference of discrimination. Respondent, for example, might have established a prima facie case if he had shown that he was better qualified than the successful white applicants; a decision to hire a less well-qualified applicant is, on its face, economically disadvantageous to the employer.

Although the district court understandably emphasized respondent's failure to show that he was more qualified than the successful applicants, [17] we have never suggested that this is the only way in which a plaintiff might prove a prima facie case. There are other possible approaches, one or more of which should prove fruitful to

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[17] Respondent's credentials (detailed by the court of appeals (Pet. App. 22a-24a)) are impressive (although not all necessarily pertinent to his ability to perform the Postal Service jobs in issue), and the district court may have considered them to be respondent's principal method of attempting to show a prima facie case. But the district court found (*id.* at 54a, 59a) that respondent did not show that he was more qualified than those who were selected, and the court of appeals did not overturn this finding.

a plaintiff who has in fact been discriminated against.[18] For example, discriminatory bias is, as the term itself suggests, generally a trait or tendency possessed by a decisionmaker—whether the decisionmaker is an institution or a particular supervisory employee—and therefore tends to be manifested with some regularity. As a result, a victim of discrimination should generally be able to point to other decisions or actions, besides the one he is challenging, that evidence racial prejudice. Thus statistical "[e]vidence of longlasting and gross disparity between the [racial] composition of a work force and that of

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[18] For this reason, we believe it promotes clarity to confine the second element of the *McDonnell Douglas* definition (referring to whether the plaintiff was qualified) to minimal, absolute qualifications, not relative qualifications. See pages 13-14 note 8, *supra*. For purposes of that element, an applicant is qualified if he crosses a certain "threshold" (*Valentino* v. *United States Postal Service*, 674 F.2d 56, 71 n.24 (D.C. Cir. 1982)); one might say that he is qualified so long as he is not unqualified. Many applicants can, therefore, be qualified. See, *e.g.*, *Powell* v. *Syracuse University*, 580 F.2d 1150, 1155 (2d Cir.), cert. denied, 439 U.S. 984 (1978); *Flowers* v. *Crouch-Walker Corp.*, 552 F.2d 1277, 1283 (7th Cir. 1977). The Court has consistently used the term in this way. See, *e.g.*, *Texas Department of Community Affairs* v. *Burdine*, *supra*, 450 U.S. at 254 n.6, 259; *Furnco Construction Corp.* v. *Waters*, *supra*, 438 U.S. at 576 & n.8; *McDonnell Douglas Corp.* v. *Green*, *supra*, 411 U.S. at 802-803.

By the same token, a plaintiff who attempts to establish a prima facie case by showing that he is more qualified than the successful candidate cannot rely solely on the qualifications specified by the employer at the time the employer seeks applications. An employer may select among eligible (that is, minimally qualified) applicants on some basis different from those specified by the eligibility criteria; it is unrealistic to expect an employer to enumerate, when he advertises a vacancy, all the reasons he may have for ultimately preferring one candidate. Indeed, an employer might realize that a particular quality or attribute would be desirable for the position he is filling only when he sees that quality in an applicant.

* * * the pool of qualified job applicants" (*International Brotherhood of Teamsters* v. *United States*, *supra*, 431 U.S. at 340 n.20) is frequently used to establish a prima facie case of discrimination against individual applicants. See *id.* at 359 & n.45; *Hazelwood School District* v. *United States*, 433 U.S. 299, 308 n.13 (1977); *McDonnell Douglas Corp.* v. *Green*, *supra*, 411 U.S. at 804-805; *Davis* v. *Califano*, 613 F.2d 957, 962 (D.C. Cir. 1979); *Donaldson* v. *Pillsbury Co.*, 554 F.2d 825, 833 (8th Cir.), cert. denied, 434 U.S. 856 (1977). "If race or sex bias in fact infects selection across-the-board * * * it should not be impossible to assem[b]le the evidence from which a pattern of discrimination can be inferred." *Valentino* v. *United States Postal Service*, 674 F.2d 56, 73 (D.C. Cir. 1982) (Ginsburg, J.). Moreover, since Title VII was not enacted until 1964, a victim of discrimination will often be able to show a history of more overt discrimination by an employer;[19] when coupled with a showing that "relevant aspects of the decisionmaking process had undergone little change" (*Hazelwood School District* v. *United States*, *supra*, 433 U.S. at 309-310 n.15), this too may be enough to establish a prima facie case. See *ibid.*; *Village of Arlington Heights* v. *Metropolitan Housing Development Corp.*, 429 U.S. 252, 267 (1977).

Nor does this exhaust the ways in which a victim of discrimination might be able to establish a prima facie

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[19] Congress extended the protections of Title VII to federal employees in 1972. Equal Employment Opportunity Act of 1972, Section 11, Pub. L. No. 92-261, 86 Stat. 111, codified at 42 U.S.C. 2000e-16; see *Morton* v. *Mancari*, 417 U.S. 535, 547 (1974). Although racial discrimination in federal employment had previously been unlawful (see *Bolling* v. *Sharpe*, 347 U.S. 497 (1954); 5 U.S.C. (Supp. III) 7201(b)), Congress found it to be "entrenched" (H.R. Rep. No. 92-238, 92d Cong., 1st Sess. 24 (1971)) and pervasive. See *Brown* v. *General Services Administration*, 425 U.S. 820, 825-828 (1976).

case. Anecdotal evidence has often been used to show that "the supervisory * * * employees having responsibility [for the challenged decision] * * * betrayed in other matters a predisposition towards discrimination against members of the involved minority" (*Pettit* v. *United States*, 488 F.2d 1026, 1033 (Ct. Cl. 1973)), although inevitably the district court will have to evaluate the import of such evidence. A typical showing might consist of remarks that betray prejudice or stereotyped thinking (*e.g.*, *id.* at 1028; *Crawford* v. *Western Electric Co.*, 614 F.2d 1300, 1314 (5th Cir. 1980)), inconsistent actions in a supervisory role that suggest discrimination (see, *e.g.*, *Kunda* v. *Muhlenberg College*, 621 F.2d 532, 540, 546 (3d Cir. 1980); *Causey* v. *Ford Motor Co.*, 516 F.2d 416, 423 (5th Cir. 1975)), or a failure to correct the discriminatory acts of subordinates (compare *Hagans* v. *Andrus*, 651 F.2d 622, 626-627 (9th Cir. 1981), cert. denied, 454 U.S. 859 (1981), with *Wright* v. *National Archives and Records Service*, 609 F.2d 702, 715-716 & n.16 (4th Cir. 1979)).

We recognize that some of these kinds of evidence may be more readily available to the employer than to a plaintiff. The extent to which this is true should not be overstated; anecdotal evidence, for example, is likely to be more readily available to an employee, and the employee may be able to obtain much other information through his union. See *International Union of Electrical Workers* v. *NLRB*, 648 F.2d 18 (D.C. Cir. 1980). But even if the information were in the sole possession of the employer, that would not be a sufficient reason to excuse the plaintiff from having to introduce it as part of his prima facie case. Plaintiffs' prima facie cases in other areas of the law frequently include elements that can more easily be demonstrated by the defendant; in some tort actions, for

example, plaintiffs must prove facts about the defendant's state of mind or about the reasonableness of various practices in the defendant's business or profession. See *McCormick's Handbook of the Law of Evidence* 787 (2d ed. E. Cleary 1972). Commentators have recognized that the importance of the parties' relative access to information can easily be overstated as a factor in defining a prima facie case. See, *e.g.*, 9 J. Wigmore, *Evidence* § 2486, at 290-291 (J. Chadbourn ed. 1981); Cleary, *Presuming and Pleading: An Essay on Jusristic Immaturity*, 12 Stan. L. Rev. 5, 12 (1959). Indeed, evidence of several of the undisputed elements of a *McDonnell Douglas* prima facie case—such as the existence of a vacancy and the claimant's qualifications—is under the immediate control of the employer.

Like any other plaintiff, a Title VII plaintiff can, of course, invoke the discovery provisions of the Federal Rules of Civil Procedure. See *Texas Department of Community Affairs* v. *Burdine*, *supra*, 450 U.S. at 258. "Expanded pretrial discovery would seem to have diminished greatly [the] importance" of placing the burden of production on the party in possession of the information. *McCormick's Handbook on the Law of Evidence*, *supra*, at 787.

Moreover, Title VII plaintiffs in particular have another means of ready access to information held by the employer. Federal employees who allege discrimination are entitled to an elaborate administrative process, consisting of conciliation efforts by an Equal Employment Opportunity Counselor (29 C.F.R. 1613.213), an investigation by an agency official (29 C.F.R. 1613.216), a hearing before a Complaints Examiner (29 C.F.R. 1613.218), and review by the agency and then the Equal Employment Opportunity Commission (29 C.F.R. 1613.221, 1613.231-1613.236). The investigation must be "a thorough review of the circumstances under which the

alleged discrimination occurred, the treatment of members of the complainant's group * * * compared with the treatment of other employees in the organizational segment in which the alleged discrimination occurred, and any policies and practices related to the work situation which may constitute, or appear to constitute, discrimination even though they have not been expressly cited by the complainant" (29 C.F.R. 1613.216(a)).

Witnesses giving testimony in the investigation are sworn, and agency employees are required to cooperate with the investigation (29 C.F.R. 1613.216(a), (b)). Any witnesses whom the complainant seeks to have appear at the hearing must do so unless the Complaints Examiner gives the complainant reasons, on the record, for disapproving the request, or the witness's appearance is administratively impractical; in the latter case, the witness is to provide testimony by written interrogatories (29 C.F.R. 1613.218(e)). The witnesses are subject to cross-examination, and "[i]nformation having a bearing on the complaint or employment policy or practices relevant to the complaint shall be received in evidence" (29 C.F.R. 1613.218(c)(2)). Thus the administrative record—the documents compiled in the investigations, the records of the hearings, as well as the recommendations and findings of the reviewing officials—may well contain the evidence the plaintiff needs to prove a prima facie case. This record is made available to the complainant (29 C.F.R. 1613.217, 1613.221(b)(2), 1613.222). See *EEOC* v. *Associated Dry Goods Corp.*, 449 U.S. 590 (1981).

In sum, it should not be "onerous" (*Texas Department of Community Affairs* v. *Burdine*, *supra*, 450 U.S. at 253) for a claimant to obtain the evidence he needs to raise an inference of discrimination—if that evidence exists.

2. The employer's reason for rejecting the claimant's application will ordinarily be ascertained during the in-

vestigation. Indeed, one of the virtues of the administrative inquiry is that it is likely to cause the responsible officials to give an account of their actions in a setting less artificial than a trial months or years after the event. In this case, for example, the Complaints Examiner investigated and then specifically described the reasons given by the responsible officials for denying respondent the promotions and details at issue here. If the reason for the employer's action is not ascertained during the administrative process, a plaintiff can always inquire into it during discovery.

Once an employer has given a reason, the plaintiff will be able to explore other ways of raising an inference of discrimination. See *Flowers* v. *Crouch-Walker Corp.*, 552 F.2d 1277, 1282 (7th Cir. 1977). For example, he may show that the reason is based on a factual premise that the employer did not really believe or "was so ridden with error that [the employer] could not honestly have relied upon it" (*Lieberman* v. *Gant*, 630 F.2d 60, 65 (2d Cir. 1980)), or that the employer acts according to the proffered reason only when employees of a certain race or sex are involved (see, *e.g.*, *Taylor* v. *Philips Industries, Inc.*, 593 F.2d 783, 786 (7th Cir. 1979); *United States* v. *Lee Way Motor Freight, Inc.*, 625 F.2d 918, 930-931 (10th Cir. 1979)). Such a showing, when made by a qualified minority applicant, should be sufficient to establish a prima facie case. Thus respondent might have had a prima facie case if he had shown that his supervisors did not believe that the transfers and promotions he rejected would make him better suited for the positions he unsuccessfully sought, or that similarly situated white employees' rejections of such opportunities did not count against them. Respondent had an opportunity to make such a showing—because he learned the reason for his rejection

during the administrative proceedings, at the latest—but he failed to do so.

Moreover, while the question is not presented here, we suggest that, at least in some circumstances, an employer's unjustified failure to provide a reason for his action, when asked to do so during discovery or an administrative investigation, may itself complete the prima facie case of a qualified minority applicant. "[M]ore often than not people do not act in a totally arbitrary manner, without any underlying reasons, especially in a business setting." *Furnco Construction Corp.* v. *Waters*, *supra*, 438 U.S. at 577. Of course, an employer who has a reason for his action may have a legitimate explanation for not divulging it. Since respondent was provided with a reason, it is unnecessary to consider in this case what possible justifications might excuse an employer's failure to provide a reason. See generally *In re Dinnan*, 661 F.2d 426 (5th Cir. 1981), cert. denied, No. 81-1714 (June 7, 1982). But in the absence of such a justification, since most employers can be expected to have a reason for their employment decisions, a refusal to supply a reason in response to a proper request suggests that the true reason is an impermissible one. [20]

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[20] The Court has made it clear that an employer need not provide a reason that is somehow objective or quantifiable; an employment decision may rest on the employer's subjective evaluation of the candidates' attributes. See *McDonnell Douglas Corp.* v. *Green*, *supra*, 411 U.S. at 803-804. "[W]here * * * the employer in the best of faith merely weighed each person's talents then [chose] the man over the woman (or the woman over the man), no case is made out under Title VII." *Pond* v. *Braniff Airways, Inc.*, 500 F.2d 161, 165 (5th Cir. 1974). See also *Scott* v. *University of Delaware*, 601 F.2d 76, 81 (3d Cir.), cert. denied, 444 U.S. 931 (1979) (applicant for faculty position rejected because faculty believed he "would not develop into an acceptable permanent professional colleague"); *Shack* v. *Southworth*, 521 F.2d 51, 55 (6th Cir. 1975) (applicant not hired because of his "attitude" and "lack of desire").

3. A victim of employment discrimination should, therefore, have abundant opportunities to establish a prima facie case. He can show that he was better qualified than the applicant who was selected, or that the challenged employment decision appears in some other respect to be economically irrational. He can show statistical or other evidence of a discriminatory bias that manifests itself in a pattern of conduct or in other particular instances. The information he needs to make these showings should be readily available through discovery or in the administrative investigation. Finally, the claimant can ask the reason for his rejection. If a reason is supplied, he can attempt to show that it was a pretext. If a reason is unjustifiably not supplied, that alone may complete the prima facie case. In short, if there exists evidence that gives rise to an inference of discrimination—instead of just creating a bare possibility of discrimination—a plaintiff should be able to obtain it and introduce it as part of his prima facie case. There is accordingly no need to adopt the court of appeals' approach in order to ensure that a plaintiff with a good claim of employment discrimination will be able to establish a prima facie case.

2. A defendant should not be required to present a defense in an employment discrimination action unless the plaintiff shows more than the court of appeals required.

In *Texas Department of Community Affairs* v. *Burdine*, *supra*, the Court held that when a plaintiff establishes a prima facie case of disparate treatment, the defendant need only articulate, not prove by a preponderance of the evidence, a legitimate reason for the challenged employment decision. *Burdine* described the basic order of proof in a disparate treatment case (450 U.S. at

252-253, quoting *McDonnell Douglas Corp.* v. *Green*, *supra*, 411 U.S. at 802, 804):

> First, the plaintiff has the burden of proving by the preponderance of the evidence a prima facie case of discrimination. Second, if the plaintiff succeeds in proving the prima facie case, the burden shifts to the defendant "to articulate some legitimate, nondiscriminatory reason for the employee's rejection." * * * Third, should the defendant carry this burden, the plaintiff must then have an opportunity to prove by a preponderance of the evidence that the legitimate reasons offered by the defendant were not its true reasons, but were a pretext for discrimination.

Out of context, this passage could be read to suggest that the only consequence of a plaintiff's establishing a prima facie case is that the employer must articulate a reason for the challenged action. As we have said, this will ordinarily not be difficult for an employer who has not discriminated. It might therefore be argued that the court of appeals' approach, even if erroneous in some sense, is not unduly burdensome to a defendant.

This argument is incorrect, and is indeed belied by *Burdine* itself. Ordinarily in Title VII litigation, the defendant will, at the close of the plaintiff's case, make a motion to dismiss under Fed. R. Civ. P. 41(b). If the plaintiff has established a prima facie case, this motion must be denied. But if the motion is denied, the defendant ordinarily will not just articulate a reason; as the Court said in *Burdine*, "the defendant * * * retains an incentive to persuade the trier of fact that the employment decision was lawful, [and therefore] the defendant normally will attempt to prove the factual basis for its explanation" (450 U.S. at 258). In other words, the defendant not only will articulate the reason for its decision but will attempt to show that its reason was not a pretext.

In doing so, the defendant will, for example, introduce evidence that the plaintiff in fact had the shortcoming assigned as the reason for his rejection; that the successful candidate did not have that shortcoming or was otherwise better qualified; or that its practices generally show no sign of discrimination. See *McDonnell Douglas Corp.* v. *Green*, *supra*, 411 U.S. at 804-805. That is, the defendant will ordinarily present its entire case. It must do so because once the motion to dismiss has been denied, there is always some risk that the trial court will find the defendant's proffered reason "unworthy of credence" (*Texas Department of Community Affairs* v. *Burdine*, *supra*, 450 U.S. at 256), or will conclude that "the plaintiff's initial evidence, combined with * * * cross-examination of the defendant, * * * suffice[d] to discredit the defendant's explanation" (*id.* at 255 n.10). However weak the plaintiff's case may appear to be, the defendant cannot prudently offer less than all the available evidence in support of its explanation. [21]

This is often a very burdensome aspect of Title VII litigation. See *Lieberman* v. *Gant*, *supra*, 630 F.2d at 62 n.1; *Johnson* v. *University of Pittsburgh*, 435 F. Supp. 1328, 1332 (W.D. Pa. 1977). Not only may the defendant introduce statistical and other background information, but the court and the parties will probably be forced to examine in detail the employment qualifications of the plaintiff and those who were hired in his place. [22] See *East*

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[21] In its first opinion, the court of appeals said that on remand the government was to introduce "proof concerning the legitimacy of the promotion decisions here at issue," including evidence comparing respondent's qualifications to those of the employees who received the [illegible]itions he sought (Pet. App. 27a).

[22] In *Lieberman*, Judge Friendly commented (630 F.2d at 62 n.1): "We do not understand how either the federal courts or universities can operate if the many adverse tenure decisions against women or members of a minority group that must be made each year are

v. *Romine, Inc.*, 518 F.2d 332, 339 (5th Cir. 1975) ("[C]omparative evidence lies at the heart of a rebuttal of a prima facie case of employment discrimination."). Particularly when the employees work in a bureaucracy, many criteria may be used to evaluate them, and the judgments and impressions of the large number of people who come into contact with them can be relevant; one can imagine, for example, the evidentiary inquiry needed to determine if the employer's explanation that a candidate was selected because he was more compatible with his co-workers—a common and ordinarily reasonable explanation (see, *e.g.*, *Burdine* v. *Texas Department of Community Affairs*, 647 F.2d 513, 514 (5th Cir. 1981))—was a pretext. See also page 29 note 20, *supra*. In general, the only way to avoid such inquiries is a dismissal of the complaint under Rule 41(b) (or a grant of summary judgment) on the ground that the plaintiff has failed to prove a prima facie case.

We of course recognize that if a plaintiff has genuinely raised an inference that he was discriminated against, the defendant should be required to present the appropriate evidence in response. But as we have explained, the court

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regularly taken to court and entail burdens such as those here incurred." In *Johnson*, after a five-day hearing to determine whether the plaintiff had a prima facie case, the trial lasted 74 days. 435 F. Supp. at 1332. At its conclusion, the complaint was dismissed. See also *Vuyanich* v. *Republic National Bank*, 505 F. Supp. 224, 232 (N.D. Tex. 1980). "It is little wonder that some courts have expressed concern at the spectacle of trials lasting for weeks, following years of discovery, and involving a multitude of statistical and other experts and seemingly endless testimony about the credentials of a single candidate. These cases are just not worth it, from the point of view of litigants, courts, or society generally, unless broad issues related to the legality of entire job systems are to be considered." Bartholet, *Application of Title VII to Jobs in High Places*, 95 Harv. L. Rev. 947, 1002 (1982).

of appeals' approach would enable a plaintiff to establish a prima facie case—and thereby force an employer to present an extensive defense of its action—whenever any disappointed qualified applicant was of a different sex, race, religion, or national origin from the successful applicant. In other words, the effect of the court of appeals' approach is to compel employers to mount a full-scale defense, in court, of routine employment decisions that show no sign of being discriminatory. We do not believe Title VII was intended to have that effect. [21]

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[21] An alternative way of resolving the problem created by the court of appeals' approach would be to divide into two subsidiary stages the third stage of litigation identified in the passage in *Burdine* quoted at page 31, *supra*. Disparate treatment litigation would then have four stages: (1) the plaintiff must introduce some quantum of evidence sufficient to require the employer to articulate a reason for the challenged decision; (2) the employer must articulate a reason (if he has not already done so in discovery or the administrative process); (3) the plaintiff then must adduce evidence (or point to evidence he has already adduced) sufficient to show that the employer's explanation is a pretext; and (4) the employer then has an opportunity to rebut that evidence. See *Lieberman* v. *Gant*, *supra*, 630 F.2d at 65-66. The fourth stage is the most burdensome for the defendant; the crucial question, therefore, is what the plaintiff must show to be entitled to survive a Rule 41(b) motion at the end of stage (3). Our discussion of a prima facie case in this brief is intended to answer that question.

Such a four-stage process—with motions to dismiss in order at two separate points—would be unconventional, however, and quite unlike the customary civil suit in which the plaintiff presents a single case-in-chief followed by the defendant's case-in-chief. Rule 41(b) itself seems to contemplate only two cases-in-chief. Moreover, as we have said, the defendant's explanation is often available (and often should be made available) before the trial even begins.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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Respondent's Brief

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

UNITED STATES POSTAL SERVICE BOARD OF GOVERNORS,
Petitioner,

v.

LOUIS H. AIKENS,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENT

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QUESTION PRESENTED

Was the court of appeals' holding that respondent, plaintiff below, had made out a *prima facie* case of discrimination, consistent with decisions of this Court, with the legislative history of Title VII of the Civil Rights Act, as amended, and with the polices and purpose underlying Title VII?

Table of Contents

	Page
Opinion Below	1
Jurisdiction	2
Statute Involved	2
Statement of the Case	3
A. Background	3
B. Selection procedures for details to higher level positions	6
C. The treatment of whites and blacks	9
D. Comparison of Aikens and his white colleagues	20
E. Experience as a factor in selection for higher level jobs	27
F. Anecdotal evidence remarks that betray prejudice or sterotyped thinking	32
Summary of Argument	34
ARGUMENT:	36
I. Introduction	36

Page

II. The Legislative History of the Equal Employment Opportunity Act of 1972 Supports the Continuing Vitality of McDonnell Douglas and the Decision of the Court Below 55

III. the Prima Facie Case Rule of McDonnell Douglas Is A Reasonable and Effective Approach for Individual Title VII Cases 70

IV. The Decision Below Is Fully Consistent With McDonnell Douglas v. Green and Its Progeny 88

A. The Prima Facie Case ... 88

B. Addition Facts Demonstrating Discrimination 92

C. Petitioner's Arguments Are Inconsistent With McDonnell Douglas and Burdine 95

Conclusion 110

Statutory Appendix

Table of Authorities

Cases	Page
Alexander v. Louisiana, 405 U.S. 625 (1972)	75
Barrett v. U.S. Civil Service Commission, 69 F.R.D. 544 (D.D.C. 1975)	45
Blake v. Califano, 626 F.2d 891 (D.C. 1980)	47
Board of Trustees of Keene State College v. Sweeney, 439 U.S. 24 (1978)	38,79,109
Brown v. G.S.A., 425 U.S. 820 (1976)	56,64
Castaneda v. Partida, 430 U.S. 482 (1977)	73
Chandler v. Roudebush, 425 U.S. 840 (1976)	45,51
Chisholm v. United States Postal Service, 516 F. Supp. 810 (M.D.N.C. 1980), aff'd, 655 F.2d 482 (4th Cir. 1981)	65,92,93,96
City of Mobile v. Bolden, 446 U.S. 55 (1980)	69
Clark v. Alexander, 489 F. Supp. 1236 (D.D.C. 1980)	64

Page

Clark v. Chasen, 619 F.2d 1330 (9th Cir. 1980) 64

Connecticut v. Teal, ___U.S. ___, U.S.L.W. 4716 (June 4, 1982) 99

Copeland v. Marshall, 641 F.2d 880 D.C. Cir. 1980) 46

Davis v. Califano, 613 F.2d 957 (D.C. Cir. 1979) 96,99,108

Davis v. Weidner, 596 F.2d 726 (7th Cir. 1979) 81,82,85

Day v. Mathews, 530 F.2d 1083 (D.C. Cir. 1976) 45

deLesstine v. Ft. Wayne State Hosp., 29 FEP Cases 195 (7th Cir. 1981) 84

Eastland v. T.V.A., 553 F.2d 364 (5th Cir. 1977) 46

Evans v. Baldridge, 27 FEP Cases, 1479 (D.D.C. 1982) 83

Flowers v. Crouch-Walker Corp., 552 F.2d 1277 (7th Cir. 1977) ... 78,81

Franklin v. Trokel Mfg. Co., 501 F.2d 1013 (6th Cir. 1974) 78

Fullilove v. Klutznick, 448 U.S. 448 (1980) 67

Page

Furnco Construction Corp. v. Waters, 438 U.S. 567 (1978) 38,79,99

Gates v. Georgia-Pacific Corp., 492 F.2d 292 (9th Cir. 1974) 79

Griggs v. Duke Power Co., 401 U.S. 424 (1971) 56

Hackley v. Roudebush, 520 F.2d 108 (D.C. Cir. 1975) 51

Harrell v. Northern Electric Co., 672 F.2d 444 (5th Cir. 1982) 98,108

Harrison v. Lewis (D.D.C., Civ. Act. 79-1816, June 17, 1982) 64

Houseton v. Nimmo, 670 F.2d 1375 (9th Cir. 1982) 47

Johnson v. Bunny Bread Co., 646 F.2d 1250 (8th Cir. 1981) 84

Kaufman v. Sidereal Corp., 677 F.2d 767 (9th Cir. 1982) ... 84

Kenyatta v. Bookey Packing Co., 649 F.2d 552 (8th Cir. 1981) 84

King v. New Hampshire Dept. of Resources, 562 F.2d 80 (1st Cir. 1977) 78,80

Page

Kunda v. Muhlenberg College, 621 F.2d 532 (3rd Cir. 1980) 107

Loeb v. Textron, Inc., 600 F.2d 1003 (1st Cir. 1979) 80,81,87

McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973) ..... passim

McKenzie v. McCormick, 425 F. Supp. 137 (D.D.C. 1977) 64

Meyer v. Brown and Root Constr. Co., 661 F.2d 369 (5th Cir. 1981) 83

Mitchell v. M.D. Anderson Hosp., 29 FEP Cases 263 (5th Cir. 1982) 84

Morton v. Mancari, 417 U.S. 535 (1974) 64

New York Gaslight Co. v. Carey, 447 U.S. 54 (1980) 45

Parker v. Califano, 561 F.2d 320 (D.C. Cir. 1977) 49

Payne v. Travenol Laboratories, 673 F.2d 798 (5th Cir. 1982) ... 108

Peters v. Jefferson Chemical Co., 516 F.2d 447 (5th Cir. 1975) 81,82,83

Pointer v. Sampson, 62 F.R.D. 689 (D.D.C. 1974) 44

Page

Powell v. Syracuse University, 580 F.2d 1150 (2nd Cir. 1978) .. 78,85

Rodriguez v. Taylor, 569 F.2d 1231 (3rd Cir. 1977) 84

Sabol v. Snyder, 525 F.2d 1009 (10th Cir. 1975) 79

Saunders v. Claytor, 629 F.2d 596 (9th Cir. 1980) 47

Segar v. Civiletti, 508 F. Supp. 609 (D.D.C. 1981) 64

Smith v. Califano, 446 F. Supp. 530 (D.D.C. 1978) 45

Taylor v. Louisiana, 419 U.S. 522 (1975) 73

Texas Department of Community Affairs v. Burdine, 450 U.S. 248 (1981) ..... passim

Thompson v. Sawyer, 28 F.E.P. Cases 1614 (D.C. Cir. 1982) 64

Trout v. Hidalgo, 517 F. Supp. 873 (D.D.C. 1981) 64

Turner v. Fouche, 396 U.S. 346 (1970) 73

Page

Turner v. Texas Instruments, Inc., 555 F.2d 1251 (5th Cir. 1977) 80

Valentino v. United States Postal Service, 674 F.2d 56 (D.C. Cir. 1982) 65

Washington v. Davis, 426 U.S. 229 (1976) 72

Wells v. Harris, 1 Merit Systems Protection Board Decisions 199 (1979) 68

Williams v. T.V.A., 552 F.2d 691 (6th Cir. 1977) 48

Womack v. Munson, 619 F.2d 1292 (8th Cir. 1980) 81,82

Wright v. National Archives Records Service, 609 F.2d 702 (4th Cir. 1979) 80,83

Statutes

Civil Service Reform Act of 1978; P.L. 95-454; 92 Stat. 1111 ... 41,50

Equal Employment Opportunity Act of 1972, Section 717 ..... passim

Page

5 U.S.C. §§ 1206 65

5 U.S.C. §§ 2302(b)(1)(A) 65

5 U.S.C. §§ 2302(d) 66

5 U.S.C. § 4302(b)(1) 66

5 U.S.C. §§ 4313(5) 66

5 U.S.C. §§ 7121(d) 65

5 U.S.C. §§ 7201 66

5 U.S.C. §§ 7702 65

5 U.S.C. § 7702(e)(1) 50

42 U.S.C. § 2000e-16 ..... passim

P.L. 97-205; 96 Stat. 135 69

Other Authorities

Bartholet, Application of Title VII to Jobs in High Places, 95 Harv. L. Rev. 947 (1982) 107

C.C.H. Employment Practices Guide ¶ 5046 (1977) 46

C.C.H. Employment Practices Guide ¶ 5327 (1975) 44

Executive Order 11478 56

Federal Personnel Manual, Chap. 300. 93

Page

Hearings before the General Subcommittee on Labor of the Committee on Education and Labor - House of Representatives, Washington, D.C., December 2, 1969 62

Hearings before the Labor Subcommittee of the House Committee on Education and Labor, March 3, 1971 63

Hearings Before the Subcommittee on Labor of the Senate Committee on Labor and Public Welfare, Oct. 4, 1971 43,63

Hill, "The AFL-CIO and the Black Worker: Twenty-five Years After the Merger", 10 Journal of Intergroup Relations 5 (1982) 47

H. Rep. No. 92-238 (92d Cong., 1st Sess. 1971) 57,60,61

117 Cong. Rec. 32 (1971) 61

1978 U.S. Code Cong. & Adm. News, p. 9795 41

President's Reorganization Plan No. 1, 1978 41,65

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No. 81-1044

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1981

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UNITED STATES POSTAL SERVICE BOARD OF GOVERNORS,

Petitioner,

v.

LOUIS H. AIKENS,

==========

On Writ of Certiorari to The United States Court of Appeals For The District of Columbia Circuit

==========

BRIEF FOR THE RESPONDENT

==========

OPINIONS BELOW

The opinion of the district court (Pet. App. 49a-59a) is not reported. The initial opinion of the court of appeals (Pet. App. 17a-40a) is reported at 642 F.2d

514. The opinion of the court of appeals on petitions for rehearing (Pet. App. 43a-48a) is not reported. The order of this Court vacating the initial judgment of the court of appeals and remanding for reconsideration (Pet. App. 10a-14a) is reported at 453 U.S. 902. The opinion of the court of appeals on remand (Pet. App. 2a-9a) is reported at 665 F.2d 1057.

JURISDICTION

The judgment of the court of appeals (Pet. App. 1a) was entered on September 8, 1981. The petition for a writ of certiorari was filed on December 4, 1981, and granted on March 22, 1982 (J.A. 12). The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATUTE INVOLVED

This action involves 42 U.S.C. §2000e-16, the full text of which is set out in the appendix to this brief.

STATEMENT OF THE CASE

Respondent generally agrees with petitioners' statement of the procedural history of this case. In order to put the legal questions raised by this case in their proper context, however, a full statement of the facts herein is necessary.

A. Background

Respondent, Louis H. Aikens, is a Black man who began his employment with the Post Office in Washington, D.C. in 1937. He was promoted to his first supervisory position in 1952; until 1960, he held various jobs at the level of foreman. From 1960 to 1966, he received six promotions that raised him from the foreman level to the level of Assistant Director, Operations Division for Transit Mails. He was the first Black to be at that level; until 1973, only whites were above him. Between

1966 and 1973, there were four positions in the Washington, D.C. Post Office that were ranked above PFS-15. During that period, several white employees, all with less seniority and experience than Aikens, were promoted and/or detailed above him.

After the Job Evaluation Program (JEP) in 1973,[1/] Aikens' job was rated at grade PES-20; however, following the implementation of the Job Evaluation Program, several additional positions were rated above Aikens' job and several junior white employees received details or promotions above Aikens. In 1974, Aikens was upgraded twice, once by virtue of a

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1/ The Postal Service's Job Evaluation Program resulted in a revision of the agency's grade structure. Whereas before 1973 the grades ranged from 7 to 18, afterwards they ranged from 15 to 29 in the professional and supervisory positions in the Washington, D.C., post office.

promotion and once pursuant to a "detail" (temporary assignment). Between 1966 and 1974, however, Aikens was neither detailed nor promoted above his Assistant Director position. His failure to be promoted or detailed during this latter period formed the basis of this Title VII suit. (App. E, 18a-19a).[2/]

Aikens filed an Equal Employment Opportunity complaint with the Postal Service on January 4, 1974, alleging, inter alia, that the Postal Service's failure to promote and/or detail him to higher level positions during the entire eight year period, from 1966 until 1974, constituted racial discrimination of a continuing nature. (Id., 19a, 19a, n.1.) However, because of the time limitations in the EEO

2/ "App. E" refers to the appendix filed in the court of appeals below.

regulations,[3/] administrative and judicial review was focused only on Aikens' failure to be promoted to four positions for which promotions or details had occurred within thirty days of the complaint. The four positions in question were Mail Processing Officer; Acting Mail Processing Representative; Director, Operations Division; and Customer Services Representative. (Id. 19a-20a.)

B. Selection procedures for details to higher level positions

The procedure for supervisory promo-

3/ 5 C.F.R. §713-214 (1974) (now, 29 C.F.R. §1613.214) provided that only matters occuring within 30 days of the time an EEO Counselor was contacted would be considered as part of the EEO complaint. Matters outside that time could, however, be considered as background. Evidence concerning earlier matters was introduced at trial on that limited basis. The correctness of the lower courts' holding that the judicial complaint should be limited to the four latest positions is not at issue here.

tions required that the employee state on a Postal Service form 1717 any job in the Washington, D.C. Post Office for which he wanted to be considered (Tr. 167).[4/] The plaintiff had form 1717s on file for all jobs above his position of Assistant Director, Operations Division, and he was interested in being promoted or detailed to any position above his level 15 prior to JEP, and to any job above level 22 subsequent to JEP in March, 1973 (Tr., 67, 86, 90, 91, 132).

The Washington, D.C. Post Office did not post or solicit interested personnel to fill details; individuals were selected by higher level supervisors (Stip. 32; J.A.10).[5/] The administrative procedure

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4/ "Tr" refers to the trial transcript.

5/ "Stip" refers to the stipulation of facts entered into evidence as plaintiff's Exhibit 4 (Joint Appendix, 6-11)

to assign a management official to a detail involved only the preparation of POD Form 1723, "Assignment Order", signed by an official with authority over the vacant position; the normal procedure was to detail an employee for period not to exceed 89 days, but the detail could be extended by another Form 1723 (Stip. 18; J.A. 8). Details were to be renewed only one time after the initial 89 day period, but the Postal Service had people who stayed on detail for years (Tr. 69, 108).

The managment officials responsible for selecting employees to be promoted and/or detailed into positions higher than that which the plaintiff held from 1966 until 1974 were the Postmaster (or Officer In Charge) and the District Postal Manager. During the relevant time frame, these positions were held by Carlton Beall and

Ellsworth Rapee, both of whom were white. Details were made either by Beall or by Rapee with the concurrence of Beall. (Tr. 38, 216-217, 241, 314)[6/]

C. The Treatment of Whites and Blacks.

It had long been a practice of the officials of the Washington, D.C. Post Office to select white employees for promotion or detail to higher level positions, even though they were not more qualified than Black employees. While there had been an improvement in the makeup of the supervisory workforce, especially in the period between the filing of the complaint in 1974 and the trial in 1979,

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6/ The position of District Postal Manager was superior to that of Postmaster. Beall held the position of postmaster until 1971, when he became District manager. Rapee then was acting postmaster until the selection of a black male into the position on a permanent basis in early 1974 after respondent filed his EEO complaint.

the statistics as of February, 1974, showed that the percentage of white employees occupying higher level positions was much greater than the percentage of white employees in the employee complement of the Washington, D.C. Post Office. Thus, when the complaint herein was filed, less than 14% of all employees were white. Nevertheless, more than 48% of the supervisors (including the postmaster) were white. (Stip. 3-4; J.A. 6.)[7/] One of the

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7/ As of February 7, 1974, the employee complement of the Washington, D.C. Post Office totaled 8,634 employees, 7,403 of whom, or 85.7%, where of a minority group background (Stip. 3). As of the above date, 84.3% of Category I employees (covered by the 1973 National Agreement) were of a minority group background; 64.9% of Category II employees (not covered by the Agreement and in pay levels 1-14, except Postmasters and Supervisors) were of a minority group background, whereas only 51.6% of Category III employees (not covered by Agreement and in pay levels 15 and above, including all Supervisors and Postmasters) were of a minority group

reasons that the percentage of black supervisory employees has increased over the years was due to a decrease in the pool of white employees, which left managment with fewer opportunities to promote them. (Tr. 20-21, 247). Although the situation at the Washington Post Office had improved considerably and a Black appointed Postmaster in early 1974, these developments all took place after Aikens filed his initial EEO complaint in January 1974.

On August 27, 1966, Aikens was promoted to the position of Assistant Director, Operations Division for Transit Mails. He was not detailed or promoted above that

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7/ continued

background. (Stip. 4). It should be noted that February 7, 1974, was subsequent to the appointment of a black Postmaster in January 1974 and also subsequent to JEP (March 1973). Pay level 15 (PES) in February 1974 would be analagous to a pre-JEP level 7 (PFS).

position until January 9, 1974, a period of more than seven years. (Stip. 6; J.A. 7). Upon his appointment to the position of Assistant Director in 1966, Aikens was the highest ranking black supervisor in the Washington, D.C., Post Office and remained so until January 8, 1972, a period of more than five years (Stip. 5; J.A. 7). No other black employee advanced above the level of the plaintiff until March, 1973, when William Gordon's position of Assistant Director, Operations Division for Local Services, was reclassified from PFS-15 to PES-23 (Tr. 128-129).

This upgrading occurred only nine months prior to Aikens' initial complaint and was due solely to the JEP reclassification of job levels, not to a promotion action. During the same period, while respondent did not advance, the following whites, inter alia, all of whom were junior

to Aikens in supervisory seniority, continually progressed in their careers, being detailed or promoted to higher levels: Dominic M. Barranca, Francis A. Miller, Ellswo[illegible]h H. Rapee, and Marvin G. Thomas (Stip. 7; J.A. 7). These same individuals ultimately occupied the four positions at issue in this case.

From August 1966 to JEP in March 1973, there were only four positions higher than Aikens' position in the Washington, D.C. Post Office: Director, Installation Services (PFS-17); Assistant Director, Operations Division for Distribution (PFS-16); Director, Operations Division (PFS-17); and Postmaster or Officer In Charge (PFS-18). (Stip. 19; J.A. 8). During the same period, six white persons were detailed and/or promoted into one or more of the above positions a total

of 29 times (Stip. 20-22; J.A. 8-9).[8/]

From July 1971, when C.G. Beall vacated the Postmaster's position, until JEP in 1973 there was only one board for the

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8/ The positions, persons detailed, and date of details were as follows (see, Stip 28 and 29; J.A. 9-10.

(a) Director, Installation Services: L.M. Lieb (07-26-71), (10-26-71), (09-09-72 until retirement in December 1973).

(b) Assistant Director, Operations Division for Distribution: L.M. Lieb,* (05-04-71), (11-14-71); E.C. Ray,* (07-26-71), (10-22-71); F.A. Miller, (05-26-73), (08-24-73), (11-21-73); M.G. Thomas, (02-17-73), (05-17-73); D.M. Barranca,* (11-06-71), (09-08-72), 12-06-72); L.V. Bateman, Jr., (02-21-71).

(c) Director, Operations Division: E.H. Rapee * (detailed 05-04-71 until promotion on 03-04-72), (03-04-72 to 06-23-72); E.C. Ray,* (06-24-72), (09-24-72), (12-23-72); D.M. Barranca,* (02-17-73), (05-17-73), (08-15-73), (11-12-73).

"*" indicates those persons eventually promoted over respondent.

positions of Director, Operations Division and Assistant Director Operation Division for Distribution (Stip. 25; J.A. 9). Respondent Aikens (PFS-15) was the second choice of the Promotion Advisory Board for each of these positions, with the selections being forwarded to the Officer In Charge on February 25, 1972. (Stip. 26; J.A. 9). This resulted in E.H. Rapee's promotion to Director, Operations Division (PFS-17) and in L.M. Lieb's promotion to Assistant Director, Operations Division for Distribution (PFS-16) on March 4, 1972 (Stip. 25; J.A. 9). That same Board ranked D.M. Barranca (PFS-14) third behind Aikens, even though Barranca had been detailed to the position of Acting Assistant Director, Operations Division, for Distribution on November 6, 1971. (Stip. 27; J.A. 9). Nevertheless, on September 8, 1972, only six months after he had been selected below

Aikens for the above position by the Promotion Advisory Board, Barranca was detailed to the position of Assistant Director, Operations Division for Distribution. (Stip. 31; J.A. 10).[7/]

During the same period, subsequent to the promotion board in February 1972 which resulted in the promotions of Lieb and Rapee to the positions of Assistant Director, Operations Division for Distribution and Director, Operations Division, respectively, both were detailed to other jobs, which left the above positions open for details by others. Under the circum-

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9/ Both Lieb and Rapee subsequently were detailed to new jobs within a short period of time after their promotions of March 4, 1972; Lieb was again detailed on September 9, 1972, to Acting Director, Installation Services, where he remained until his retirement in December 1973, and Rapee was detailed to the position of Officer In Charge on June 24, 1972, where he remained until January 1974. (Stip. 30; J.A. 10).

stances, the evidence shows that, at those times, Aikens would have been the individual most qualified to be detailed and/or promoted to the Director, Operations Division position, or at the very least, to the position of Assistant Director, Operations Division for Distribution. Yet once again, his white colleagues were detailed while Aikens remained frozen in the same position he had occupied since 1966 (see, Stip. 21-24; J.A. 8-9).

On March 3, 1973, Aikens' position, Assistant Director, Operations Division for Transit Mails was reclassified to PES-20 under JEP (Stip. 37; J.A. 10). As a result of the position being ranked at PES-20, he was no longer eligible for the position of Postmaster, Washington, D.C. (Stip. 38; J.A. 11). In the nine months between JEP and Aikens' promotion on January 9, 1974 to

PES-21, he appealed the PES-20 rating.[10/]

The testimony showed that Aikens wanted to be promoted to a level PES-23 or above, since this would keep him in contention for the Postmaster's job, but not to a level below PES-23, since he felt this would jeopardize his reclassification appeal. (Tr. 74, 81-82). Subsequent to JEP, Aikens was not detailed or promoted to one of several unfilled higher level positions for which he was qualified and which would have placed him at a level which was within the area of consideration for Postmaster, even though junior white

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10/ The higher job classification, which Aikens sought when his position was rated PES-20 instead of PES-23, was delayed during that period even though a position as head of a facility over which Aikens had supervisory responsibility was rated at a level higher than that of Aikens'. (Tr. 69, 70, 249; Pl. Ex. 2.)

males were placed in such positions.[11/]

Daniel J. Thomas, white, who was Aikens' Administrative Assistant from 1969 until approximately 1974 (Tr. 195), indicated that Aikens was a capable manager and that the "operations that [Aikens] controlled were very efficient" (Tr. 202). Thomas observed that all the individuals being detailed or promoted above Aikens were white and he questioned why Aikens was not promoted. He considered the possibil-

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11/ The following white persons were detailed and/or promoted to positions at the following levels higher than Aikens' level (PES-20); F.A. Miller (PES-22); C. Errico (PES-26); M.G. Thomas (PES-26); D.J. Robertson (PES-24); A.J. Eckerl (PES-21); J.J. Spelta (PES-23); W.E. Hahn (PES-22) (Stip. 24; J.A. 9). F.A. Miller was also detailed three times to the position of Assistant Director, Operations, and D.M. Barranca was detailed three times to the position of Director, Operations Division. (Stip. 21-22; J.A. 8-9) Another example was the position of Manager of Personnel (PES-23) on September 29, 1973, in which A.J. Eckerl replaced D.J. Robertson, who

ity that race was a factor in Aikens not receiving promotions or details to higher level positions.[12/]

D. Comparison of Aikens and his white colleagues.

In The Findings and Recommended Decision (November 12, 1975) in this case at the administrative level the EEO Complaints Examiner stated at page 6: "In a

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11/ continued

was promoted to Employee and Labor Relations Specialist (PES-24), for which Aikens also was qualified. Management was willing to laterally transfer Aikens to the Manager of Personnel position sometime in 1971, when it was rated PFS-15, but not promote him to that position in September 1973 when it was rated PES-23. (PL. Ex. 3d, 31; Tr. 319-322).

12/ Thomas stated that "these were people who had worked for Mr. Aikens, the knowlege they had acquired in the Postal Service certainly came about as a result of their contact with him, and it was from my point of view a strange coincidence that these people were promoted and he was in a slot at a stand still" (Tr. 203) (Emphasis supplied).

discrimination complaint case the crucial consideration in analyzing issues is comparative information of the treatment afforded complainant and members of his group (other similarly-situated Black employees) and the treatment afforded similarly-situated non-members of his group. Consequently, I will not review on the merits complainant's and the selectees' comparative qualifications... ." (Emphasis supplied) Similarly, during the trial before Judge Hart, the court ruled that plaintiff's witnesses could not compare the plaintiff's capabilities with those of his white colleagues unless that witness had been a superior of the individual being compared. The only supervisors were Beall, Rapee, and whites they had promoted over respondent. The Court, in denying Counsel the opportunity to examine witnesses about their opinions of their

supervisors, stated, "You have records here that show his qualifications, and apparently he was well qualified. The question is not whether he was well qualified, the question is whether he was not promoted because of discrimination, not because he was qualified." (Tr. 173-176)

The record shows that Aikens participated in the first National Conference on Equal Employment Opportunity in the Postal Service in September 1967; subsequently he was Chairman of the Postmaster's E.E.O. Committee for a period of three years. At the time of filing his E.E.O. complaint he had been the E.E.O. Administrative Officer for the City Post Office for approximately two years (Stip. 15; J.A. 8). It was during that period of time that Aikens did not advance beyond his position of Assistant Director, Operations Division for Transit Mails.

There was no derogatory or negative information found in plaintiff's official personnel folder to indicate that he had not fulfilled the requirements of his position (Stip. 11; J.A. 7). In 1968 plaintiff was rated as "an outstanding supervisor whose management abilities were far above average" (Stip. 16; J.A. 8).

Of the four white supervisors who were placed into the positions at issue here, Miller completed 10th grade, Rapee completed 11th grade, Thomas completed high school, and Barranca completed 8 months of college (Stip. 12; J.A. 7). Moreover, Carlton Beall, who was the Postmaster and later District Postal Manager during the relevant time period, had only completed the 10th grade (Stip. 12; J.A. 7). Aikens has a Master's Degree and had completed 3 years residence on his Ph.D. (Stip. 14; J.A. 7). Aikens had as many, or more, training and

development courses and seminars as did the four white supervisors (Stip. 17; J.A. 8), and the four white supervisors were junior to plaintiff in supervisory seniority (Stip. 7; J.A. 7).

A comparison of the POD Form 7's which contain transactions concerning promotions, details, and other pertinent information about the four white supervisors and Aikens (Pl. Ex. 3A, 3B, 3F, 3G, and 3I) in conjunction with Aikens' form 6802x (Pl. Ex. 1) shows that the majority of the four white supervisors had no more experience in various positions than Aikens prior to their being promoted or detailed to positions above that of Aikens. In fact, most had less.[13/] No one, other than Aikens,

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13/ Aikens had occupied the following supervisory positions prior to his initial complaint: Foreman; General Foreman; Methods and Standards Analyst; Assistant Tour Superintendent; Superintendent of Main

had any experience in the position of Assistant Director, Operations Division for Transit Mails, since that position was

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13/ continued

Window Service; Tour Superintendent; and Assistant Director, Operations Division for Transit Mails (Pl. Ex. 3A).

Dominic Barranca, who was appointed to the position of Director, Operations Division had formerly occupied the following positions: Foreman; Survey Officer; General Foreman; Assistant Tour Superintendent; Tour Superintendent; and Assistant Director, Operations Division for Distribution (Pl. Ex. 3B)

Francis Miller, who was appointed to the position of Acting Mail Processing Representative had formerly occupied the positions of Foreman; Survey Officer; General Foreman; Assistant Superintendent, AMF (under Aikens' jurisdiction); Tour Superintendent; Assistant Director, Operations Division for Distribution (Pl. Ex. 3F).

Ellsworth Rapee, who was appointed to position of Customer Services Representative, had formerly occupied the following positions: Foreman; Superintendent. Special Delivery Services; General Foreman; Assistant Tour Superintendent; Tour Superintendent; Director of Finance; Director, Operations Division; and Officer In Charge (Pl. Ex. 3G).

continually occupied by him during the period in question.

In July 1972, Carlton Beall nominated three persons for the Postmaster position, none of whom was Aikens. Beall's first choice was E.H. Rapee, who had been detailed to the position on June 24, 1972 (where he remained through January 4, 1974). The Regional Office added Aikens' name as a candidate for Postmaster in 1972, feeling he was qualified for the position. (Stips. 23, 34, 35, 40; J.A. 7-11).[14/] After Aikens' name was added in

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13/ continued

Marvin Thomas, who was appointed to the position of Mail Processing Officer, formerly occupied the following positions: Foreman; Survey Officer; General Foreman; Assistant Superintendent, Registry; Assistant Director, Operations Division for Distribution; and Manager, Quality Control (Pl. Ex. 3I)

14/ No other names were added, even though six or seven individuals were eligible.

1972 as a candidate, the list of four names was never submitted to the selection board during the nine month period when Aikens was eligible for consideration (Stip. 36; J.A. 10).

E. Experience as a factor in selection for higher level jobs.

Although postal experience purported to be the predominate qualification factor considered for detail or promotion (Stip. 33; J.A. 19), Aikens, who had as much or more varied experience than his white colleagues, was never detailed and/or promoted to a higher level position. The testimony of both Aikens and Postmaster Beall indicated that during the period from

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14/ continued

(Tr. 280.) In March 1972, in order to be eligible for the position of Postmaster, an employee was required to be in a level 15 position and to have had six years of extensive management experience (Tr. 274-75).

1966 through JEP in March 1973, only two positions were discussed with Aikens, that of Director of Finance and Director of Personnel, both of which would have been lateral moves and thus not promotions for Aikens. Thus, Aikens was never offered a promotion or detail above the PFS-15 rating of his position as Assistant Director, Operations Division for Transit Mails prior to JEP (Tr. 78-80, 311, 315-316).[15/]

In discussing the importance of the two positions, Beall stated that "anyone who understands the personnel procedures and helps to direct them is quite an asset because 80 percent of our problems were with people," and that the Work Measurement

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15/ Postmaster Beall, testifying about his discussion of the Finance position with Rapee, stated that "Mr. Rapee said he would prefer not to take it, but if I wanted him he would." (Tr. 319.) Although phrased differently, this was the same position Aikens took regarding the Personnel position.

System under the Director of Finance "... really was the crux of the total management responsibility" (Tr. 312). However, Beall also testified that those jobs (i.e. Personnel and Finance), while they would broaden someone's experience in the Postal Service, were not absolutely necessary (Tr. 318). In fact, most of the white individuals promoted or detailed above the plaintiff did not have any experience in either one of those areas.[16/]

16/ Of the four white supervisors, Rapee, Miller, Thomas and Barranca, who were placed into the positions at issue, none was ever Director of Personnel, and Ellsworth Rapee was the only one to occupy the position of Director of Finance. Beall, when testifying as to why he "offered" those positions to Aikens, stated that Aikens had "a good formal education ... good knowledge of the Postal Service, and I though he could effectively handle this...." Beall, however, did not think Dominic Barranca "was equipped to handle that particular type of assignment...." Beall also stated that he didn't discuss the positions with Francis Miller or Marvin

Even though former Postmaster and District Manager Beall testified, he never gave any reasons as to why plaintiff was not promoted or detailed above the position of Assistant Director, Operations Division for Transit Mails. The entire record clearly shows that the plaintiff was qualified for any position in the Washington, D.C. Post Office, up to the Postmaster's position, and that he was interested in being promoted and/or detailed to higher level positions. Although few comparisons were made by witnesses as to the relative capabilities of the plaintiff and his white colleagues, what little there was, in conjunction w h the personnel

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16/ continued

Thomas either because "it was a very important assignment ... and I was interested in the people that were best qualified for the job.... Naturally, you would use what you consider the best equipped." (Tr. 318-319, 321-322.)

records, shows that the plaintiff was at least as qualified, if not more so, than the whites who were continually being promoted and/or detailed to higher level positions.[17/]

The promotions that Aikens received in 1974 also attest to his qualifications to perform work at higher levels of employment. Only a few days after Aikens had filed his employment discrimination complaint in January 1974, he received a promotion to Area Logistics Manager, ranked at job grade PES-21. Shortly thereafter, he was detailed to the position of Assistant Manager of Distribution, PES-24. (App. E, p. 23a).

17/ For example, Louis Thompson indicated that Francis Miller was deficient in communication because it was necessary for him (Thompson) to "write all [Miller's] letters for him because he couldn't write a decent report." (Tr. 228).

F. Anecdotal Evidence - Remarks That Betray Prejudice or Stereotyped Thinking

Petitioner has suggested that "anecdotal" evidence has often been used to show that supervisors have betrayed a predisposition towards discrimination (Brief, p. 25). Respondent introduced such evidence, which the trial court did not mention when it held that plaintiff had failed to make out a prima facie case. All the testimony concerned Carlton Beall, who as Postmaster and District Manager,[18/] essentially controlled all selections to higher level management positions.

Mr. Louis Thompson, a Black supervisor, testified that Mr. Beall once made the following statement to him about blacks: "All they want to do is to lay around and breed like yard dogs and collect

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18/ See n.6, supra.

relief checks" (Tr. 220). His perception of Beall, was that he "was operating on an 1865 concept .... would only want black janitors. He very reluctantly gave any ground as far as I could see.... I dealt with him quite frequently and while we didn't always agree I think he had a contempt for black people. I still think he has." (Tr. 219-220).

Mr. William F. Moore, Jr., a white supervisor, testified that Mr. Beall was always making remarks about Blacks. In particula he remembered Mr. Beall remarking to an all white group at a meeting: "You know, they don't have to set (sic) in the back of the bus anymore" (Tr. 250-251). Mr. Malcom Christian, a black supervisor testified that Mr. Beall referred to black people as "'that crowd' practically all the time ...," and that he frequently made sarcastic comments about Mr. Aikens educa-

tion. (Tr. 252-254.)

Despite all of this evidence, most of which was based on stipulated, and therefore undisputable, facts or official personnel records, the district court held that plaintiff had not even made out a prima facie case of discrimination. It is the holding of the court of appeals that this constituted error that is the issue presented here.

Summary of Argument

I.

The positions advanced by petitioner are founded upon a lack of appreciation of the nature and extent of employment discrimination. If adopted, they would result in the effective overruling of McDonnell Douglas v. Green, 411 U.S. 792 (1975), and a substantial weakening of Title VII as a remedial statute.

II.

The legislative history of the Equal Employment Opportunity Act of 1972 demonstrates Congress' concern with the pervasiveness of discrimination in employment in American society. The protections of Title VII were extended to federal employees because of findings that minorities and women continued to be excluded from high level positions throughout the government. Effective enforcement of the Act's provisions are necessary to root out this entrenched discrimination.

III.

McDonnell Douglas v. Green and its progeny have proved to be effective tools to address claims of employment discrimination. The lower courts have applied the prima facie analysis in a flexible manner to address the facts in particular cases.

Therefore, its continued vitality and use are essential to the vigorous enforcement of Title VII.

IV.

The decision of the court below was a correct application of McDonnell Douglas v. Green to the facts in this case. Plaintiff clearly established a prima facie case, and the decision should be affirmed.

ARGUMENT

I.

Introduction

Although ordinarily the brief for respondent would focus on the arguments made by the petitioner, we feel it incumbent to discuss a number of issues raised by the present case not touched upon in the Government's Brief to any substantial degree. As will be developed in detail below, there is a fundamental disagreement between the views of the respondent and the

Congress of the United States, on the one hand, and the Government and its supporting *amici* on the other, with regard to the extent and seriousness of racial discrimination in employment in the United States.

The general thrust of the briefs of the Government and *amici* is that Title VII is something of a nuisance to employers. Discrimination based on race, sex and other prohibited categories is not, in their view, a serious problem. Nevertheless, employers and labor unions are unduly besieged by lawsuits that misuse Title VII to attack non-discriminatory, race-neutral, and fair employment practices. Thus, they are seeking from this Court rules which would make it difficult, to the point of near impossibility, for plaintiffs to bring or maintain actions under Title VII.

Although they do not explicitly so state, they in reality are seeking the

overruling of McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1975) and its progeny,[19/] at least insofar as those decisions provide a straight-forward and expeditious way for a plaintiff to establish a prima facie case of discrimination, and thus to permit a court to move to an investigation of the employment practices which have given rise to the complaint. They seek insulation from having to defend employment practices by requiring the plaintiff, as a condition of simply going forward with his or her case, practically to prove the entire case. In essence, they wish to avoid having even to start mounting a defense to a charge of discrimination unless they already know that they have

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19/ Furnco Construction Corp. v. Waters, 438 U.S. 567 (1978); Board of Trustees of Keene State College v. Sweeney, 439 U.S. 24 (1978); Texas Department of Community Affairs v. Burdine, 450 U.S. 248 (1981).

virtually no defense at all.

Respondent suggests that the adoption of these views, which are typical of defendants in Title VII cases, will turn the statute on its head. The rules urged by petitioner essentially presuppose that there is no discrimination in employment and that the plaintiff has a heavy burden to prove otherwise. Of course, as McDonnell Douglas and its progeny fully recognize, the ultimate burden of proof in a particular employment discrimination case, as with any other type of civil litigation, rests with the plaintiff and we do not seek to escape that burden. However, the rules by which a prima facie case can be established in these cases stem from the Court's sensitivity to and awareness of the societal concerns that led to the passage of Title VII in 1964 and its expansion in 1972.

The Acts reflect a national consensus that discrimination based on race and sex has been a pervasive problem in American society. Moreover, one of the main foci of that problem was employment, in which Blacks, other minorities, and women were consistently relegated to lower paying positions regardless of their qualifications or merit, and where, conversely, white males enjoyed special privileges and benefits. Given the pervasive and all encompassing nature of the problem, Congress not only enacted Title VII in 1964, but strengthened it and broadened its scope by the Equal Employment Opportunity Act of 1972. Section 717, which extended Title VII's provisions to federal government agencies, was enacted because of findings by Congress that the federal government had failed in its constitutional duty to correct discrimination in its own ranks.

Even subsequent to 1972, when it enacted the Civil Service Reform Act of 1978[20/] and approved reorganization measures dealing with the enforcement of federal sector EEO,[21/] Congress found that discrimination and the lack of equal employment opportunity was still a serious problem in the federal government.[22/]

Of course, Congress has done nothing to date to indicate it has changed its view as to the seriousness of discrimination in the federal sector; nor has it done anything to indicate that discrimination among private employers and state and local

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20/ P.L. 95-454; 92 Stat. 1111.

21/ President's Reorganization Plan No. 1, 1978 (1978 U.S. Code Cong. & Adm. News, p. 9795).

22/ See, Part II, infra, for a discussion of the 1978 Act.

government agencies has ceased to be a serious problem. If, however, the views of the government and its amici are adopted, there will be a judicial weakening of a statute enacted and reenacted by Congress as a matter of considered judgment. We, therefore, respectfully suggest that the approach taken by petitioner must be rejected. As we will show, the decision below is fully consistent with the decisions of this Court and with the purpose of Title VII. Therefore, it must be affirmed and the case remanded to the district court for further proceedings.

Before proceeding with the discussion of the pertinent legislative history and its relevance to the issues presented herein, however, we believe it is necessary to put the position taken by the government in the present case in its historical context. The government opposed the

passage of § 717 in 1972;[23/] following its enactment the government, primarily through the Civil Division of the Department of Justice and the offices of the United States Attorneys acting as defense counsel, vigorously sought to restrict the enforcement of Title VII against it by taking a series of positions which would have limited the judicial remedies available to

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23/ The Civil Service Commission testified against the passage of Section 11 of S.2515, the original version of § 717. See, Statement of Irving Kator, Assistant Executive Director, U.S. Civil Service Commission, in Hearings Before the Subcommittee on Labor of the Committee on Labor and Public Welfare, U.S. Senate, Oct. 4, 6 and 7, 1971, pp. 297-304. The CSC's opposition focused on two points: (1) the transfer of authority over federal EEO to the Equal Employment Opportunity Commission (later deleted from the statute); and (2) the need for establishing the right of federal employees to obtain judicial relief for discrimination. At the same time the CSC opposed Section 11, of S.2515, it expressed support for H.R. 1746 which, as it passed the House, had no provision similar to § 717 covering federal employees.

federal government employees and which would have placed the government in a favored position with regard to both the procedural and substantive rules governing such actions.

The sequence of cases and strategy employed by the government to limit the scope and effectiveness of Title VII is a long one and can only be summarized here. The keystone of the government's assault on Section 717 was its argument that federal employees, unlike all others, were not entitled to a trial de novo when they got in court. From this argument flowed arguments that federal employees were not entitled to maintain class actions,[24/] receive counsel fees,[25/] or obtain other

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24/ See, Pointer v. Sampson, 62 F.R.D. 689 (D.D.C. 1974).

25/ See, Letter from Irving Jaffee, Acting Asst. Attorney General to Senator John Tunney, May 6, 1975 (reprinted in C.C.H., Employment Practices Guide ¶ 5327 (1975)).

types of relief except under narrow circumstances.[26/]

The government lost the trial de novo battle as a result of this Court's decision in Chandler v. Roudebush, 425 U.S. 840 (1976).[27/] Following Chandler the government took, for the first time, an enlightened view of Section 717, and announced that as a general policy it would not argue

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26/ See, Day v. Mathews, 530 F.2d 1083 (D.C. Cir. 1976).

27/ In other litigation the government was forced to change a number of its rules relating to the administrative enforcement of Title VII. Thus, the government was ordered to permit the filing of class action complaints administratively. Barrett v. U.S.C.S.C., 69 F.R.D. 544 (D.D.C. 1975). Court action was similarly required to bring about the reform of practices such as the refusal to grant attorneys' fees for work done during the administrative process (Smith v. Califano, 446 F. Supp. 530 (D.D.C. 1978); see, New York Gaslight Co. v. Carey, 447 U.S. 54, 61, n.2 (1980)), and to impose proper rules for granting relief once there had been an administrative finding of discrimination.

that it was subject to special rules. It abandoned its position with regard to class actions and stated that it would no longer argue that different types of relief were available to nongovernment employees.[28/]

This approach was, unfortunately, short lived. More recently the government has argued, for example, that the rules for calculating attorneys' fees in Title VII cases should be different when the government is defendant,[29/] that a federal court

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28/ The change in policy was announced after Chandler and a series of appellate court decisions holding that federal employees had the same right to maintain class actions in Title VII cases as did all other employees (Eastland v. T.V.A., 553 F.2d 364 (5th Cir. 1977); Williams v. T.V.A., 552 F.2d 691 (6th Cir. 1977)). See, Memorandum for United States Attorneys and Agency General Counsels Re: Title VII Litigation, from Attorney General Griffin B. Bell (Aug. 31, 1977) (reprinted in CCH Employment Practices, ¶ 5046 (1977)).

29/ See, Copeland v. Marshall, 641 F.2d 880 (D.C. Cir. 1980).

should not enforce a final administrative decision in a complainant's favor,[30] and, successfully to date, that federal employees, unlike all others covered by Title VII, cannot receive adjustments in back pay awards to account for the factor of inflation or other delays in payment.[31]

The point to be made in recounting this history is that the government as a defendant in Title VII actions has been less than enthusiastic about the statute, and the positions it takes in its Brief here reflect that attitude.[32] Indeed, it

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30/ See, Houseton v. Nimmo, 670 F.2d 1375 (9th Cir. 1982)..

31/ See, Saunders v. Claytor, 629 F.2d 596 (9th Cir. 1980); Blake v. Califano, 626 F.2d 891 (D.C. 1980).

32/ The government's lack of enthusiasm has generally been shared by its amici. See, e.g., Hill, "The AFL-CIO and The Black Worker: Twenty-five Years After the Merger", 10 Journal of Intergroup Relations 5, 36-44, 53-58 (1982).

is noteworthy that the brief contains virtually no discussion of the legislative history of either the 1964 or 1972 Acts,[33/] nor any discussion of Congress' findings, purposes, and concerns in enacting them. Rather, it to a large extent consists of a discursive account of alleged difficulties employers have in selecting employees and in defending Title VII cases.

We suggest that the picture painted by the government and its amici is simply inaccurate. Employers are not overburdened by defending Title VII cases. Indeed, if anything, the volume of cases is too small given the extent and nature of employment discrimination in our society. The relatively low number of cases is a reflection of the inequality of burdens in these

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33/ Petitioner's entire discussion of the history of the 1972 Act is found in note 19, p. 24, of its Brief.

cases. Bringing a Title VII action against an employer, particularly when that employer is an agency of the government of the United States, is an intimidating proposition beyond the resources of most employees. In an individual case of discrimination, a federal employee is faced with overwhelming counter-resources, including attorneys from the United States Attorney's office, agency counsel, and, in many instances, lawyers from the Department of Justice itself.[34/] Ordinarily, virtually all of the relevant information is in the hands of the agency, which is defended by attorneys expert in the use of the federal rules to their advantage.

34/ Unlike private and state and local government employes, the federal employee stands alone. There is no public attorney general to aid in prosecuting his lawsuit. See, Parker v. Califano, 561 F.2d 320, 331 (D.D.Cir. 1977).

Contrary to the government's unsupported assertions, a typical federal employee case goes into court either after there has been virtually no processing of his EEO complaint,[35/] or after a decision of the agency charged that it has not been guilty of discrimination. Thus, the government, at pages 26-27 of its Brief, makes a number of claims concerning the administrative processing of federal EEO complaints. Any suggestion that this administrative process has proved generally successful as a means for rooting out employment discrimination in the federal

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35/ Section 717 permits a federal employee to file in court 180 days after filing the administrative complaint if there has been no final agency decision. Although this provision was enacted because of Congress' concern over delays in processing federal EEO complaints (see the parallel provisions in the Civil Service Reform Act of 1978, 5 U.S.C. § 7702(e)(1)), most agencies take substantially longer on the average to process complaints. Therefore, many court complaints are filed prior to hearings or final decisions.

sector is supported neither by fact nor in counsel's experience.[36/]

In any event, this Court held similar assertions by the government irrelevant in Chandler v. Roudebush, supra, given Congress' intent to provide federal employees with the same broad rights in court as those enjoyed by all other employees. Any argument that more stringent burdens should be imposed on federal employees for them to establish a prima facie case because of the purported, but illusory, benefits of the administrative process should similarly be rejected.

36/ See, Hackley v. Roudebush, 520 F.2d 108, 137-141 (D.C. Cir. 1975); Ralston, "The Federal Government as Employer: Problems and Issues in Enforcing the Anti-Discrimination Laws," 10 Ga. L. Rev. 717 (1976); Brief of the NAACP Legal Defense and Educational Fund, Inc., as amicus curiae, in Chandler v. Roudebush, 425 U.S. 840 (1976).

If the employee has had resources to hire counsel, or has been fortunate enough to find an attorney willing to take the case without fee contingent upon eventually prevailing, there may have been developed during the administrative process some reasonably decent record. This is often, however, not the case and extensive discovery, expenditure of funds, and legal resources are necessary to flush out the information necessary to proceed with the case.

A substantial number of litigated cases are resolved in favor of the government; a large number more are never brought or, if they are, are settled early because of problems in the case or lack of resources on the part of the plaintiff. By and large those cases that get to trial are ones in which the employee has a substantial case, and not ones where he or

she can do no more than simply make out a prima facie case of discrimination. Thus, the alarms raised by the government as to why the rights of plaintiffs need to be further cut back are simply false ones.

Finally, we suggest that it is even somewhat unseemly for the federal government to be seriously arguing that it is an unnecessary burden to it that its employees be permitted to challenge decisions made by it on the ground that they may be the result of discrimination. We believe rather, with Congress, that the government's proper role is to serve as a model for the rest of society and all other employers in its diligence and concern to root out unlawful discrimination in every respect as it relates to its own employ-

ees.[37/] Without such an example by those charged with enforcement of the laws, it can hardly be expected that private employers will take seriously their own responsibilities.

37/ As the Senate Report on the 1972 Act noted:

> The Federal government, with 2.6 million employees, is the single largest employer in the Nation. It also comprises the central policy-making and administrative network for the Nation. Consequently, its policies, actions, and programs strongly influence the activities of all other enterprises, organizations and groups. In no area is government action more important than in the area of civil rights.

S. Rep. No. 92-415 (92d Cong., 1st Sess.), p. 12.

II.

The Legislative History of the Equal Employment Opportunity Act of 1972 Supports the Continuing Vitality of McDonnell Douglas v. Green and The Decision of the Court Below.

It is clear from the legislative history of the Equal Employment Opportunity Act of 1972 that when Congress decided to make Title VII fully applicable to federal agencies it was concerned not only with the exclusion of minorities from the federal service, but specifically with their exclusion from high level positions. Congress addressed these problems in three main ways. First, it expanded the powers of the United States Civil Service Commission and mandated that it provide effective administrative enforcement of the EEO complaint process.[38/] At the same time,

38/ 42 U.S.C. § 2000e-16(b).

it provided federal employees for the first time, the clear right to go to court to enforce not only their rights under Title VII, but also their pre-existing rights under Executive Order 11478.[39/] Finally, Congress mandated that all federal agencies institute effective affirmative action programs, including training to permit all employees to reach their full potential, in order to upgrade the positions of minorities and women in the federal service.[40/]

39/ 42 U.S.C. § 2000e-16(c); see, Brown v. G.S.A., 425 U.S. 820 (1976).

40/ 42 U.S.C. § 2000e-16(b). As part of the effort to provide true equality of employment opportunity in the federal service Congress also charged the Civil Service Commission with the responsibility of examining all of its employment qualifications and criteria to ensure that they met the standards set by this court in Griggs v. Duke Power Co., 401 U.S. 424 (1971). Thus, Congress was particularly concerned with the narrowness of the Commission's belief that " malicious intent" on the part of some particular supervisor needed to be proven. S. Rep. No. 92-415 (92d Cong., 1st Sess. 1971), pp. 14-15.

Congress' concern with the concentration of minorities and women in lower levels in the federal service was part of an overall concern with their exclusion from the better, more profitable, and more prestigious positions and occupations in American society as a whole. Thus, both the Senate and House Reports referred specifically to data demonstrating that minorities and women were concentrated in certain types of jobs and excluded from others.[41/] At the same time Congress recognized that the problems of racial discrimination originally addressed in the 1964 Civil Rights Act had proven more

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41/ S. Rep. No. 92-415 (92d Cong., 1st Sess. 1971), p. 6; H. Rep. No. 92-238 (92d Cong., 1st Sess. 1971), p. 4. Both reports cited the exclusion of Blacks from professional and managerial positions as evidence that they were "still far from reaching their rightful place in society." S. Rep. No. 92-415, p. 6.

complex, deep rooted, and intractable than believed in 1964. Thus, the Senate Report acknowledged that:

> In 1964, employment discrimination tended to be viewed as a series of isolated and distinguishable events, for the most part due to ill-will on the part of some identifiable individual or organization. It was thought that a scheme that stressed conciliation rather than compulsory processes would be most appropriate for the resolution of this essentially "human" problem, and that litigation would be necessary only on an occasional basis. Experience has shown this view to be false.
>
> Employment discrimination as viewed today is a far more complex and pervasive phenomenon. 42/

Thus, contrary to the belief of petitioner, it was Congress' judgment when it decided to strengthen and broaden the scope of Title VII that discrimination in employment was indeed pervasive in American society and needed to be rooted out relent-

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42/ S. Rep. No. 92-415, p. 5.

lessly. With regard to federal government agencies specifically, both the Congressional reports and testimony before both houses explored and attested to the existence of discriminatory practices inherent in the federal system and also suggested changes to address the problem.

Congress found in the concentration of blacks and women in lower grade levels throughout the government evidence both of employment discrimination and of the failure of existing programs to bring about equal employment opportunity. Thus, the House Report stated:

> Statistical evidence shows that minorities and women continue to be excluded from large numbers of government jobs, particularly at the higher grade levels . . . .
>
> This disproportionate distribution of minorities and women throughout the Federal bureaucracy and their exclusion from higher level policy-making and supervisory positions

> indicates the government's failure to pursue its policy of equal opportunity. 43/

The Senate report similarly concluded from statistics showing the concentration of minorities and females in the lower grade levels that "their ability to advance to the higher levels has been restricted." 44/

Thus, the facts of this case present a prime example of what Congress was most concerned with. As noted supra, at n.7, as of February, 1974, immediately following the filing of respondent's administrative complaint, while Blacks were 85% of the work force at the Washington, D.C. work force, they held only 50% of supervisory and management positions. The top positions had been held by whites prior to

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43/ H. Rep. No. 92-238, p. 23.

44/ S. Rep. No. 92-415, pp. 13-14.

January, 1974, and the respondent had been repeatedly passed over in favor of whites for details and promotions.

Of course, Congress was deeply concerned that the federal government should serve as an example to others in avoiding discriminatory practices. The House report states:

> The Federal service is an area where equal employment opportunity is of paramount significance. Americans rely upon the maxim "government of the people", and traditionally measure the quality of their democracy by the opportunity they have to participate in government processes. It is therefore imperative that equal opportunity be the touchstone of the Federal system. 45/

45/ House Report No. 92-238, p. 22. See, also, the Senate Report quoted at n.37, infra, and the remarks of Rep. Badillo, 117 Cong. Rec. 32, 101 (1971) to the effect that the government needed to "put its own house in order in terms of ending its own discriminatory employment practices."

The legitimacy of Congress' concern is demonstrated by testimony before both Houses. Witnesses testified during both House and Senate Hearings that there was a general lack of confidence in the effectiveness of the existing EEO complaint process on the part of Federal employees. Richard Williams, Chairman of the Equal Employment Opportunity Committee of Maryland, an organization of employees of the Federal Government in Maryland, stated, "Racially discriminatory practices in Federal employment continue to be so rampant and widespread that the administration of the equal employment opportunity program by the Civil Service Commission has proved to be a failure."[46/] Rep. Fauntroy, of the

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46/ Hearings before the General Subcommittee on Labor of the Committee on Education and Labor - House of Representatives, Washington, D.C., December 2, 1969, p. 146.

District of Columbia, testified to the thousands of complaints he had received from Black federal employees in the District. His own father had experienced discrimination strikingly similar to that suffered by respondent here.[47/]

In sum, as this Court has noted, Section 717 was enacted because the "long standing Executive Orders forbidding discrimination had proved ineffective for

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47/ My father ... trained two generations of white employees who were then passed up and over the shoulder to higher level and higher paying jobs. From all the evidence I have seen, even today in this supposedly enlightened time, these practices continue daily with little substantive change.

Senate Hearings Before the Subcommittee on Labor of the Senate Committee on Labor and Public Welfare, Oct. 4, 6, and 7, 1971, p. 202.

See also,testimony of Clarence Mitchell, Director, Washington Bureau of the NAACP and Legislative Chairman of the Leadership Conference on Civil Rights before the Labor Subcommittee of the House Committee on Education and Labor, March 3, 1971, pp. 153-59.

the most part" and to "' correct [the] entrenched discrimination in the Federal service . . . .'" Morton v. Mancari, 417 U.S. 535, 546-547 (1974); Brown v. General Services Administration, 425 U.S. 820, 825-28 (1976). See also, Clark v. Chasen, 619 F.2d 1330, 1332 (9th Cir. 1980).[48/] Thompson v. Sawyer, ___ F.2d ___, 28 F.E.P. Cases 1614, 1640 (D.C. Cir. 1982).[49/]

48/ ("Congress was deeply concerned with the Government's abysmal record in minority employment . . . .").

49/ The accuracy of Congress' judgment is attested to by the series of decisions finding class-wide systemic discrimination in various federal agencies, including the postal service. See, McKenzie v. McCormick, 425 F. Supp. 137 (D.D.C. 1977) (Government Printing Office); Thompson v. Sawyer, 28 F.E.P. Cases 1614 (D.C. Cir. 1982) (Government Printing Office); Segar v. Civiletti, 508 F. Supp. 690 (D.D.C. 1981) (Drug Enforcement Administration); Clark v. Alexander, 489 F. Supp. 1236 (D.D.C. 1980), (Department of the Army); Trout v. Hidalgo, 517 F. Supp. 873 (D.D.C. 1981) (Department of the Navy); Harrison v. Lewis (D.D.C., Civ. Act. 79-1816, June 7, 1982) (Maritime

Subsequent to the 1972 Act Congress took further measures to correct discrimination in employment in both the federal and private sectors. Thus, the Civil Service Reform Act of 1978 reaffirms and incorporates by reference section 717 of the 1972 Act and provides new provisions for its enforcement.[50/] Congress approved shifting the responsibility for administrative enforcement to the Equal Employment Opportunity Commission because of continuing dissatisfaction with the adequacy of the role of the Civil Service Commission.[51/] The 1978 Act also reaffirms

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49/ continued

Administration). Chisholm v. United States Postal Service, 655 F.2d 482 (4th Cir. 1981). But see, Valentino v. United States Postal Service, 674 F.2d 56 (D.C. Cir. 1982).

50/ See 5 U.S.C. §§ 2302(b)(1)(A),(d); 1206; 7121(d); 7702.

51/ President's Reorganization Plan No. 1, 1978.

the affirmative action obligations of federal agencies in a variety of ways, including the strengthening of provisions requiring minority recruitment and mandating that high level federal officials be rated on their EEO and affirmative action performances.[52/]

With regard to promotions specifically, Congress enacted a new system for appraising the performance of federal employees. The key substantive provision, which requires that performance appraisals be based on objective criteria related to the job in question[53/] was enacted specifically with Title VII concerns in mind because of the recognition that reliance on subjective criteria could form the basis

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52/ See, 5 U.S.C. §§ 2302(d); 7201; 4313(5).

53/ 5 U.S.C. § 4302(b)(1).

for discrimination.[54/]

In the private sector, Congress enacted the set-aside provisions of the Public Works Employment Act of 1977 discussed and upheld by this Court in Fullilove v. Klutznick, 448 U.S. 448 (1980). Those requirements were based on congressional findings that discrimination and lack of equal employment opportunity remained a pervasive and difficult problem in the

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54/ Thus, Rep. Clay, one of the bill's sponsors in the House, explained during the Committee Markup:

> Experience with equal employment opportunity cases has demonstrated that the use of subjective criteria in promotions has been challenged in the courts on the grounds that women and minorities have been treated less fairly than white males. In sum, the use of objective criteria in performance appraisals, consistently applied, will benefit Federal employees by providing them with protection against arbitrariness and discrimination.

construction industry.[55/]

Thus, while petitioner may not believe that discrimination is "that pervasive" (Brief, pp. 18-19), Congress does. If the government believes that the need for an effective Title VII has passed, then it should seek its repeal and present whatever evidence it has for its position to the legislature. There it could perhaps explain why discrimination against Blacks, other minorities, and women has been rampant for centuries if, as petitioner contends, it is "contrary to [an] employer's economic interests" (Brief of Pet.,

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54/ continued

Quoted in Wells v. Harris, 1 Merit Systems Protection Board Decisions 199, 223 (1979). See the Wells decision generally for a comprehensive discussion of the legislative history of this provision.

55/ See, 448 U.S. at 461-467 (opinion of Burger, C.J.); 503-506 (op. of Powell, J.); 520-521 (op. of Marshall, J.).

pp. 20-21).

For our part, we are confident that Congress would continue to find employment discrimination an endemic and intractible problem.[56/] In the meantime, its findings that discrimination has been particularly pervasive among federal agencies and its determination that that it be rooted out must be determinative of the rules that govern Title VII actions.[57/] As we will

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56/ Thus, Congress has recently re-enacted and strenghtened the Voting Rights Act of 1965, despite arguments that the problem of discrimination in voting was one of the past. Interestingly, one provision of the Voting Rights Act of 1982 is a response to a decision of this Court that imposed a heavy burden of proof on plaintiffs seeking to prove voting discrimination. Compare, Section 3, P.L. 97-205, 96 Stat. 135, with City of Mobile v. Bolden, 446 U.S. 55 (1980).

57/ As recently as this year, the Postal Service itself has been the subject of congressional inquiry into the scope of racial discrimination. In response, the Postmaster General has provided statistics

now show, McDonnell Douglas and the lower court's application of it here is fully consistent with Congress' findings and intent.

III.

The Prima Facie Case Rule of McDonnell Douglas Is A Reasonable and Effective Approach for Individual Title VII Cases.

Despite the fact that the grounds for seeking and obtaining certiorari were that the appeal court's decision was inconsistent with Burdine and McDonnell Douglas, as

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57/ continued

showing that in the period June, 1980 through February, 1982, although Blacks were only 21% of the workforce, they suffered 48% of all suspensions and removal actions. Letter from William F. Bolger, Postmaster General, to the Hon. William L. Clay, Chairman, Subcommittee on Postal Operations and Service of the House Committee in Post Office and Civil Service, April 19, 1982. See, Chisholm v. U.S.P.S., 516 F. Supp. at 848-50 finding racial discrimination from a similar 2-1 disproportion at the Charlotte-Mecklenburg post office.

we shall show below it is the government's arguments themselves that suffer from this inconsistency. Of greater portent is the attempt, by the government indirectly and by its amici directly, to undercut McDonnell Douglas and to have it overruled, limited, or so changed as to render it ineffective as a method to analyze and decide individual Title VII cases raising claims of disparate treatment. These arguments should be rejected and McDonnell Douglas must be reaffirmed for the fourth time by this Court.

McDonnell Douglas is founded on the awareness that racial discrimination in employment is a pervasive problem and that Title VII was enacted in an attempt to provide meaningful remedies to combat it. (411 U.S. at 800-01.) Thus, the Court's concern was that the inquiry in a particular case of individual discrimination be

focused quickly and specifically on the evidence most relevant to a determination of intentional discrimination. The Court was acutely aware that it is the rare case where what the government and amici term "anecdotal" evidence (consisting of admissions of racial prejudice or statements evidencing prejudice) or other "direct" evidence of a biased state of mind can be obtained. Rather, in the ordinary and usual case a court will be faced with objective evidence from which an inference of dis crimination may be drawn.

The approach of McDonnell Douglas is fully consistent with over 100 years of jurisprudence in the area of intentional discrimination embodied in many decisions under the Fourteenth Amendment. In those decisions, which were canvassed in detail by this Court in Washington v. Davis, 426 U.S. 229 (1976), it has been made clear

that objective evidence of a relatively limited and specific kind is all that needs to be marshalled in order for the conclusion to be drawn that racial discrimination was at work. See Alexander v. Louisiana, 405 U.S. 625 (1972). Attempts to read the minds of particular decision makers were unnecessary because both the Fourteenth Amendment and the Civil Rights Acts were passed in order to correct that which was already established to exist, viz., discriminatory attitudes that impact on various decisions.

For example, upon a showing in a jury discrimination case that few or no Blacks,[58/] women,[59/] or Hispanics[60/] have served on

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58/ See, e.g., Turner v. Fouche, 396 U.S. 346 (1970).

59/ See, e.g., Taylor v. Louisiana, 419 U.S. 522 (1975).

60/ See, e.g., Castaneda v. Partida, 430 U.S. 482 (1977).

juries a court must draw the inference that the result came about because of discrimination. In a society without a history of race (or sex) discrimination such an inference might not be so readily drawn. However, in a nation where discrimination has played a central role for centuries, the courts must be able to address the problem in a manner which is responsive to reality. In other words, both the Fourteenth Amendment and Title VII are founded upon a clear picture of the forces at work in society, and upon what amounts to a presumption that discrimination is the norm rather than the exception.

McDonnell Douglas, therefore, sets forth simple requirements in order to launch the inquiry into the reasons for a particular employment decision. If the complainant is a member of a protected

group, if s/he has applied for a position or promotion, if s/he is qualified for that position, and if s/he does not receive it, either because it is not filled or because a member of the majority group does, then Title VII, enacted to correct a problem that runs through every level of society, requires that the employer come forward with a race- (or sex-) neutral reason for the action.[61/] This is all that McDonnell

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61/ Contrary to the government's assertions (Brief, p. 16), the fact that white males are also protected against discrimination by Title VII does not mean that the four McDonnell Douglas factors will establish a prima facie case. Although the statute protects all persons, its main purpose was to cure pervasive discrimination against minorities and women. Since discrimination against white males has never been a serious, let alone pervasive, problem in our society, the mere fact that a minority or a woman is selected over a white male would not lead to an inference that discrimination was a factor in the decision. Thus, although the substantive right to be free of discrimination is the same, what a white male may have to show to prove discrimination will be different.

Douglas requires and, as will be discussed below, that is all that the court below in the present case required as well.

If the employer cannot at least come forward with a "legitimate, non-discriminatory," or "lawful" reason, then the inference which flows from the policies embodied in Title VII is unrebutted. If, as will in most instances be the case, the employer can come forward with such an explanation, then the inquiry moves on to determine whether the reason given is but a mask or pretext for unlawful discrimination. The burden of proof at all times remains with the plaintiff; but neither the plaintiff's initial burden of establishing a prima facie case nor the employer's duty to come forward with sufficient evidence to meet it are onerous. These rules are devices to cut through and eliminate those issues which are most

easily disposed of, and to focus the attention of the court and the parties on the heart of any discrimination case. McDonnell Douglas's requirements are simple, direct and deliberately easy to meet so that the purpose embodied in Title VII -- "to assure equality of employment opportunities and to eliminate . . . discriminatory practices"[62/] -- may be addressed and dealt with in a similarly direct and forthright manner.

The government's arguments, however, would vastly complicate the process. They would require that the plaintiff prove his entire case at the beginning, and would not meet any of the policy concerns which they would ostensibly advance. Rather, they would only serve to assist employers in being able to get rid of the "nuisance" of these actions expeditiously. As we will

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62/ 411 U.S. at 800.

now show, McDonnell Douglas has worked well in the lower courts. It has neither been a source of confusion, nor has it resulted in unduly burdening employers with groundless actions.

Indeed, contrary to assertions made here, little or no controversy has surrounded what the plaintiff must do initially to satisfy the McDonnell Douglas burden of establishing a prima facie case. Rather, the controversy within the various circuits involved the nature of the showing a defendant must make in order to rebut plaintiffs' prima facie case.[63/]

63/ Some courts held that the employer was only compelled to come forth with credible evidence of a nondiscriminatory motive; King v. New Hampshire Dept. of Resources, 562 F.2d 80 (1st Cir. 1977); Powell v. Syracuse University, 580 F.2d 1150 (2nd Cir. 1978); Franklin v. Trokel Mfg. Co., 501 F.2d 1013 (6th Cir. 1974); Flowers v. Crouch-Walker Corp., 552 F.2d 1277 (7th Cir. 1977); Gates v. Georgia-

Thus while the lower courts expressed some uncertainty in applying this Court's decisions in Furnco Construction Co. v. Waters, 438 U.S. 567 (1978) and Board of Trustees of Keene State College v. Sweeney, 439 U.S. 24 (1978) regarding the evidentiary burden to be placed on the employer, these same opinions have been consistent with regard to their adherence to the prima facie standard set out in McDonnell Douglas.[64/]

63/ continued

Pacific Corp., 492 F.2d 292 (9th Cir. 1974); Sabol v. Snyder, 524 F.2d 1009 (10th Cir. 1975); while other courts held that the prima facie showing required employers to prove the legitimacy of their actions by a preponderance of the evidence or suffer an adverse determination, Burdine v. Texas Dept. of Community Affairs, 608 F.2d 563 (5th Cir. 1979).

64/ Indeed both Furnco Construction Co. and Burdine reaffirm the basic elements of a plaintiff's prima facie case under McDonnell Douglas.

The greatest potential for confusion on this issue would, of course, arise as the lower trial and appellate level courts attempted to apply the McDonnell Douglas guidelines to widely varying fact patterns. This, however, has not proved to be a significant burden. Rather, the courts of appeals have generally understood that McDonnell Douglas provides an analytical framework for evaluating claims of employment discrimination and they have been sensible and flexible in their application of its standards.[65/] In other words, they

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65/ Notwithstanding the broad range of the types of discrimination charged and the methods of proof available, the Courts of Appeal have had no difficulty ordering their evaluation of the cases pursuant to the demands of McDonnell Douglas. King v. New Hampshire Dep't of Resources, 562 F.2d 80, 83 (1st Cir. 1977); Loeb v. Textron, Inc., 600 F.2d 1003, 1013-1019 (1st Cir. 1979); Wright v. National Archives Records Service, 609 F.2d 702 (4th Cir. 1979); Turner v. Texas

have followed the Court's admonition that:

> The facts necessarily will vary in Title VII cases, and the specification . . . of the prima facie proof required from respondent is not necessarily applicable in every respect to differing factual situations. 411 U.S. at 802, n. 13.

Thus, the lower courts have applied appropriate McDonnell Douglas prima facie factors in cases raising claims of discriminatory discharge,[66/] reprisal for

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65/ continued

Instruments, Inc., 555 F.2d 1251 (5th Cir. 1977); Peters v. Jefferson Chemical Co., 516 F.2d 447, 449-450 (5th Cir. 1975); Davis v. Weidner, 596 F.2d 726, 729-30 (7th Cir. 1979); Womack v. Munson, 619 F.2d 1292 (8th Cir. 1980).

66/ A. Flowers v. Crouch-Walker Corp., supra, at 1282. Prima facie case established by showing: (1) plaintiff was a member of a racial minority; (2) he was qualified for his job; (3) he was satisfying normal requirements of the job; (4) he was discharged; and (5) whites assigned to perform the work.

B. Loeb v. Textron, Inc., supra at 1013. In ADEA case, prima facie case shown by: (1) plaintiff was in the protected

challenging discrimination[67] discrimination in hiring[68] and promotion,[69] and

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66/ continued

age group; (2) he was fired; (3) he was performing job adequately; (4) he was replaced by younger person doing the same work.

C. Davis v. Weidner, supra at 730: (1) plaintiff was a woman; (2) she was qualified for the position; (3) she was terminated; (4) a male colleague was retained in the same position.

67/ Womack v. Munson, supra at 1296, n. 6. A prima facie case of retaliatory discharge shown by: (1) filing of a lawsuit (or complaint or other protected activity); (2) employer aware of the lawsuit; (3) plaintiff discharged; (4) discharge close enough in time to justify an inference of retaliatory motive (also expressed as facts establishing a "nexus" between the protected activity and the retaliatory action.).

68/ King v. New Hampshire Dept. of Resources, supra at 83. Prima facie case of hiring discrimination shown by: (1) plaintiff was a woman; (2) position for which she was qualified was available; (3) she applied for it but was not hired; (4) questions at interview evidenced bias against women.

69/ Peters v. Jefferson Chemical Co., supra at 450. Prima facie case could be established by showing: (1) plaintiff a

denials of transfers[70] and training.[71] Notably, post Burdine rulings have followed and thereby reinforced the application of the McDonnell Douglas standards in various contexts. See, e.g., Evans v. Baldrige, 27 FEP Cases 1479, 1480-81, (D.D.C. 1982); Meyer v. Brown and Root Const. Co., 661 F.2d 369, 371-3 (5th Cir. 1981), [claims of wrongful denial of promotion];

69/ continued

woman; (2) she applied for a position for which she was qualified; (3) she was rejected; (4) the employer then decided not to fill the position.

70/ Peters v. Jefferson Chemical Co., supra at 449; prima facie case established by: (1) plaintiff a woman; (2) she made repeated requests for transfers; (3) other transfers were permitted; (4) positions for which she was qualified went to males. In addition, the result of plaintiff's not being transferred was her termination in a layoff that disproportionately affected women.

71/ See, Wright v. National Archives Records Service, supra at 714-15.

Johnson v. Bunny Bread Co., 646 F.2d 1250, 1253 (8th Cir. 1981); Kenyatta v. Bookey Packing Co. Div. Swift & Co., 649 F.2d 552 (8th Cir. 1981); Mitchell v. M. D. Anderson Hospital, 29 FEP Cases 263 (5th Cir. 1982); deLesstine v. Ft. Wayne State Hospital, 29 FEP Cases 195 at 194-5 (7th Cir. 1981); [claims of discriminatory termination]; Kaufman v. Sidereal Corp., 677 F.2d 767, 768 (9th Cir. 1982).

The lower courts have also been steadfast in their resistance to adding new "prongs" to the McDonnell Douglas standards which, like the proposals of the petitioner here, would serve to go beyond the framework and policy considerations expressed therein. In Rodriguez v. Taylor, 569 F.2d 1231, 1239 (3rd Cir. 1977), for example, the court specifically rejected the suggestion that the plaintiff must submit direct proof that a discriminatory motive underlay

an employer's decisions. In Powell v. Syracuse University, 580 F.2d 1150, 1155 (2nd Cir. 1978) the Second Circuit rejected the suggestion that the plaintiff must prove that he or she was the best-qualified candidate for the job, under the criteria suggested by the employer, in order to establish a prima facie case. The court of appeals held that such an approach,

> unnecessarily collapses the steps suggested by McDonnell Douglas by shifting considerations which are more appropriate to the employer's rebuttal phase to the earlier requirement that the employee demonstrate competence to perform the specified work.

In Davis v. Weidner, 596 F.2d 726 (7th Cir. 1979) the court also rejected the suggestion that since, unlike McDonnell Douglas, the case involved "'a simultaneous choice between prospective employees on the basis of relative qualifications under circumstances which involved judgment'",

that an additional requirement for establishing a prima facie was appropriate. There, the defendant suggested that the plaintiff need establish that his or her rejection was not the result of a relative lack of qualifications. The Seventh Circuit held:

> Establishment of a prima facie case under the McDonnell standard does not constitute an ultimate finding of fact as to discriminatory refusal to hire under Title VII . . . [citations omitted] McDonnell is merely a model for ordering and evaluating evidence concerning employment discrimination. The employer can offer his rationale for refusing to hire or for firing the complainant in the second step of the McDonnell model.

596 F.2d at 730.

This view regarding the purpose and functions of the McDonnell Douglas standard is consistent throughout the circuits and underpins their approach to applying that case to various factual situations. As

most courts have recognized, McDonnell Douglas, is foremost:

> an analytical framework enunciated post hoc, in light of a given set of facts, to give judges a method of organizing evidence and assigning the burdens of production and persuasion in a discrimination case.

Loeb v. Textron, Inc., supra, 600 F.2d at 1017.

Thus, this Court's unanimous opinion in McDonnell Douglas offers clear, precise and uncomplicated criteria for evaluating the evidence in an individual disparate treatment case. For the last nine years the Federal courts have exercised good judgment and flexibility in applying its standards in a variety of situations. In so doing, they have been mindful of that decision's concern that the inquiry be focused quickly and specifically on the circumstances most relevant to determine the reasons for a particular employment

decision. Any suggestion that McDonnell Douglas should be overruled or applied only to a limited category of cases should be unequivocally rejected.

IV.

The Decision Below Is Fully Consistent with McDonnell Douglas v. Green and Its Progeny.

A. The Prima Facie Case

In the instant case, the court of appeals has twice issued reasoned opinions which emphasize the flexibility of the McDonnell Douglas criteria and follow the reasoning of Burdine.[72/] Thus, when the actual facts of this case are examined it is beyond question that the standards and requirements of McDonnell Douglas-Burdine

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72/ In fact, in the most recent decision, the court may have gone farther than necessary in remanding to determine the "qualifications" of the respondent. Petitioner has never contested the fact that Aikens was qualified for the positions. (Petitioner's Brief, 4; 7, n. 5; 11).

for establishing a prima facie case of discrimination have been more than met. Indeed, it is clear that the case does not really present the issue as stated by the Government in its petition for a writ of certiorari, since respondent demonstrated in his prima facie case that he was as, or more, qualified than the persons selected for the positions complained of, and that the circumstances surrounding the failures to detail and promote him give rise to an inference of discrimination.

Respondent's evidence establishing a prima facie case is: (1) four positions were available; (2) plaintiff, who is Black and therefore a member of a protected class, applied for consideration for these and all other available details and promotions; (3) petitioner was fully qualified for details to these positions and, indeed, was as

qualified as any of the persons who actually received them; (4) petitioner was not given any of the details but they were given to whites no more qualified than he.

In the words of Burdine, respondent applied for and was denied positions "under circumstances which give rise to an inference of unlawful discrimination."[73/] Indeed, the facts here are strikingly similar to those which this Court found in Burdine to establish a prima facie case without serious question. The plaintiff in Burdine was a qualified woman who sought an available position. She was passed over in favor of a male who had been under her supervision.[74/] Here, although Mr. Aikens was highly qualified, he spent nearly eight

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73/ 450 U.S. at 253.

74/ Id., at n.6.

years frozen in a position and received neither details nor promotions to higher level positions. At the same time there was a repeated pattern of whites being detailed above him, even though their seniority and other qualifications were no more and, indeed, were less than his. Just as in Burdine, plaintiff had supervised a number of the persons detailed and promoted over him. In fact petitioner's prima facie case is stronger than Burdine's, since he was passed over not just once but numerous times, with the last four instances being at issue here.[75/]

75/ As noted in the statement of the case, although it has been held that petitioner is time-barred from obtaining relief for all but the last four occurrences, the past pattern of continuing refusals to give him details or promotions is relevant and probative evidence in judging the significance of the most recent events.

B. Additional Facts Demonstrating Discrimination

The strength of the prima facie case becomes evident when the system for choosing persons to fill details is examined. In the Postal Service detailing to higher level positions is a crucial element in obtaining permanent promotions to such positions.[76/] Through the detailing process, persons obtain experience in higher positions which helps them to compete against others when those positions are advertised. Under civil service regulations, detailing for lengthy periods of time is required to be done pursuant to

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76/ The problem of discrimination in detailing in the Postal Service has been the subject of extensive litigation. See, Chisholm v. United States Postal Service, 516 F. Supp. 810, 843-48 (M.D.N.C. 1980), aff'd, 665 F.2d 482 (4th Cir. 1981), where the court found pervasive racial discrimination in detailing in the Charlotte-Mecklenburg Post Office.

the competitive system. In this way the practice of "pre-selection", by which persons are given experience in a job and then selected permanently for the same job ostensibly through competition with others not given the same opportunity, is to be avoided.[77/]

In a system that operates fairly, detailing to higher level positions is done equitably from all those persons presumably qualified for the higher level positions because they encumber positions within reach of the higher one. These equally qualified persons will then obtain the specific qualifications for the higher level job, and the selecting official will be able to judge their relative qualifications based on each one's performance in

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77/ See, Federal Personnel Manual, Chap. 300, Subchapter 8. See, Chisholm v. U.S.P.S., 516 F. Supp. at 843-45 for a description of a typical postal service detailing process.

the temporary position. Obviously, the system breaks down if certain persons are favored in the detailing process, since they will obtain experience beyond that which others will obtain and will then be found most qualified because of the greater opportunities to work in the position.

In the present case, although Aikens alleged that he was continually passed over for promotions and details to higher level jobs, his main challenge was to the detailing system. As indicated in the statement of the case, the Washington, D.C., Post Office did not post or solicit interested personnel to fill details; individuals were selected by higher level supervisors, who in this case were Rapee and Beall. (supra, 7-8). Contrary to petitioners' claim (Brief, 10, 12) the evidence is undisputed that there was a failure generally to promote or detail Blacks to the higher level

supervisory positions until Aikens filed his claim on January 4, 1974 (supra, 5-6). The record also shows that Aikens was not even considered for promotion or details to higher level jobs until after he had filed his EEO complaint. (Aikens was promoted on January 9, 1974.)

Beginning in 1971 through JEP in March 1973, there were nearly 30 details to the four positions (including Postmaster), ranked at a higher level than Aikens' position of Assistant Director. All of the individuals detailed were white (supra, pp. 13-14); not once was Aikens, or any other black supervisor, detailed to one of the four positions. Subsequent to JEP, there were a number of additional details of white persons to higher level positions, including the positions at issue. Moreover, the great majority of the whites so detailed were junior to Aikens in senior-

ity, supervisory experience, and educational level. In other words, they were less qualified than he by all objective criteria.78/

Although, as will be discussed below, these facts are not necessary to establish a prima facie case under McDonnell Douglas-Burdine, they independently establish one under decisions such as Davis v. Califano, 613 F.2d 957 (D.C. Cir. 1979). Indeed, the case becomes overwhelming when the statistics on the details are combined with those on the distribution of supervisory positions. It must be kept in mind that the relevant time frame was 1966-74, precisely when Congress was making findings concerning the exclusion of Blacks from high level

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78/ The phenomenon (or rather spectacle) of highly educated Blacks being passed over in favor of much more poorly educated whites in the postal service has not been uncommon. See, Chisholm v. United States Postal Service, 516 F. Supp. at 810, 835, 838-39.

positions and determining that discrimination in the federal service was so entrenched that Section 717 was necessary. Thus, although whites comprised less than 15% of the total work force, as late as February, 1974, they encumbered nearly 50% of the supervisory and management positions. For many years, respondent was the highest ranking black employee. Until 1973 all of the persons holding the top positions at the Washington post office were white.

C. Petitioner's Arguments Are Inconsistent with McDonnell Douglas and Burdine.

1. Petitioner attempts to argue that there are, in effect, five factors in McDonnell Douglas; in addition to the four set out therein, there must be something else that "gives rise to an inference of discrimination". (Pet. Brief, p. 17).

This interpretation of McDonnell Douglas is simply a misreading of Burdine. Burdine, in the language relied upon by respondent (450 U.S. at 248), merely summarizes and paraphrases McDonnell Douglas by stating that the factors there present circumstances "giving rise" to an inference of discrimination. In no sense can Burdine be read to engraft upon McDonnell Douglas any additional requirements beyond those set out therein particularly since there was no question but that a prima facie case had been made.[79/] Nor, as petitioner now acknowledges, can the record here be read to present a case in which the plaintiff is even arguably less qualified than those persons chosen over him.

79/ The lower courts have correctly concluded that the McDonnell Douglas standards were not altered by Burdine. See, e.g., Harrell v. Northern Electric Co., 672 F.2d 444, 448 (5th Cir. 1982).

2. Moreover, neither McDonnell Douglas nor the cases cited by petitioner on pages 23 to 24 of its brief hold that statistical evidence is necessary to establish a prima facie case. Of course, Davis v. Califano, 613 F.2d 957 (D.C. Cir. 1979), holds that a plaintiff may establish a prima facie case through statistical evidence in an individual case. The Davis holding (which the government acknowledges is correct) cannot be read, consistent with McDonnell Douglas, to hold that statistics are necessary to establish such a case. Indeed, such a reading would be flatly inconsistent with Furnco Construction Corp. v. Waters, 438 U.S. 567 (1978), and this Court's recent decision in Connecticut v. Teal, ___ U.S. ___, 50 U.S.L.W. 4716 (June 21, 1982).

In both of those cases this Court made it clear that the right to be free of

discrimination is an individual one.[80/] An employer's good record overall, as demonstrated through its statistical profile, is one piece of evidence that it may introduce as rebuttal to a prima facie case. Thus, while a well-balanced work force is not "wholly irrelevant on the issue of intent" (438 U.S. at 580), in no way can it by itself refute a prima facie case of discrimination. Id. at 579. Ipso facto, such a showing cannot be inconsistent with a prima facie case to begin with, and a plaintiff is not required to show a

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80/ In Teal, the Court rejected the so-called "bottom line" approach as either imposing an additional burden on plaintiffs in establishing a prima facie case or as an affirmative defense. As the Court held:

> Title VII does not permit the victim of a facially discriminatory policy to be told that he has not been wronged because other persons of his or her race or sex were hired.

50 U.S.L.W. at 4720.

statistical pattern or practice of disparate treatment in order to shift the burden of going forward to the defendant.

4. In its petition for writ of certiorari the Government's main argument was that it was required on the part of a Title VII plaintiff to prove that he was as well or more qualified than the person selected for promotion in order to make out a prima facie case. Thus, simply to show that a person had minimal qualifications was not sufficient. The Government now suggests in its brief that it had never taken that position explicitly, and it seems to concede that a showing of minimal qualifications for the position is all that is required as long as there exists some circumstance that can give rise to an inference of discrimination.

The Government's abandonment of its prior argument is surely correct. To urge otherwise would be inconsistent with this Court's discussion in Burdine, which holds that an employer is free to choose among equally qualified persons as long as that choice is not motivated by prohibited discrimination. Thus, Burdine makes it clear that establishing that the person selected was as qualified or more so than the complainant is part of the employer's burden of coming forward with sufficient evidence to dispel the inference created by the prima facie case.[81/]

81/ The Government's earlier argument was also inconsistent with the position it advanced in this Court in opposing the granting of certiorari in St. Peter v. Marsh, No. 81-917, in which certiorari was denied on the same day it was granted here. (72 L.Ed.2d 132, 133.) In St. Peter the lower courts held that the plaintiff was more qualified than the selectee but nevertheless found that discrimination had

5. Petitioner's argument concerning Mr. Aikens' refusal to accept certain positions allegedly offered to him, is nothing more than an attempt to require a plaintiff to prove pretext, and thus his entire case, in order to make out a prima facie case. Thus, petitioner states in its Brief (p. 3-4, 12) that Aikens was not interested in the positions of Director of Finance, Director of Personnel, (both lateral transfers) and Tour Superintendent, and that his refusal to accept those positions, which would have

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81/ continued

not been shown. The Government urged here that it was indeed permissible to choose even a less qualified person as long as discrimination was not involved. (Brief in Opposition, p. 11.) Given this position the government can hardly turn around and argue here that a plaintiff need show any more than that he or she possesses the necessary qualifications for the position.

allegedly broadened his background, were the reasons for Aikens not being detailed or promoted to higher level jobs. Petitioner goes on to state that ". . . respondent might have had a prima facie case if he had shown that his supervisors did not believe that the transfers and promotions he rejected would make him better suited for the positions he unsuccessfully sought, . . ." (Brief, p. 28).[82/]

82/ The evidence shows that only two positions (Director of Finance and Director of Personnel) were discussed with Aikens during the period from August 1966 to JEP in March 1973 (supra, 14). Thus, the only opportunities Aikens was given were for positions at the level that he already held. Such details would never provide the type of promotional opportunities that details to higher level positions would. Those two lateral transfers are in stark contrast to the thirty details and/or promotions given to whites during the same period. Moreover, these whites were junior to him in seniority, supervisory experience, and educational level. Subsequent to JEP, Aikens was allegedly offered the position of Tour Superintendent, one he had occupied

As shown by the statement of the case and n.82, in the margin, the government's attempted explanation for respondent's non-selection to higher level positions by his failure to accept lateral transfers is implausible at best. In any event, these matters go to the legitimacy of the reasons given by the employer in its effort to overcome the prima facie case, or to whether the reasons are pretextual. They have nothing whatsoever to do with the prima facie case itself.

6. Finally, although the Government admits (Brief, p. 13, n.8) that the issue is not directly raised by this

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82/ continued

prior to being appointed in 1966 to his Assistant Director position. Any opportunity to advance to a higher position from that one would have been problematical at best.

case in its present posture, there has been presented the notion that when selection to a high level managerial position is at issue, the standards for establishing discrimination should be different than those for a blue collar or lower level position.[83/] The argument, as we understand it, is that because of the subjective nature of the judgment to be made in selecting a person for such a postion, it is more difficult to evaluate the correctness of the selection in the face of a discrimination charge.

We urge that the argument has no force. As one commentator has recently pointed out, there is nothing in the

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83/ See, the dissent of Judge Wilkey to the original court of appeals decision, Pet. App., pp. 33a-40a; Brief for the AFL-CIO As Amicus Curiae, pp. 11-12.

language, history, or purpose of Title VII which indicates that different standards govern depending on the job involved.[84/] Indeed, this Court's decision in Board of Trustees of Keene College v. Sweeny, 439 U.S. 24 (1978) which applied the McDonnell Douglas-Furnco standards to the granting of tenure to a college professor, is inconsistent with the position that different rules should apply to "higher level" positions.[85/]

The argument also flies in the face of the legislative history of the 1972 Act. As shown above, one of Congress' main concerns was with the continued exclusion of minorities and women from such positions by all employers, and particularly by federal agencies. Given this concern it

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84/ Bartholet, "Application of Title VII to Jobs in High Places", 95 Harv. L. Rev. 947 (1982).

85/ See, e.g., Kunda v. Muhlenberg College, 621 F.2d 532, 541-544 (3rd Cir. 1980).

would be incongruous indeed to hold that a plaintiff should have a harder time proving discrimination when complaining about the denial of equal opportunity in the very jobs where the need for an effective statute is most pressing. Rather than providing a defense to a Title VII claim, the fact that subjective and hard to define criteria have been used to make a selection should subject the decision to even closer scrutiny. As a number of courts of appeals have noted, the use of subjective criteria, particularly by a predominantly white supervisory or managerial force, can mask discrimination.[86/] It would turn the statute on its head to insulate those decisions most susceptible

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86/ See, e.g., Davis v. Califano, 613 F.2d 957, 965-66 (D.C. Cir. 1979), and cases there cited; Payne v. Travenol Laboratories, 673 F.2d 798, 824 (5th Cir. 1982); Harrell v. Northern Electric Co., 672 F.2d 444, 448 (5th Cir. 1982).

to bias from effective redress.[87/] Indeed, as the court in Davis v. Califano, 613 F.2d at 965-66, correctly held, the selection of a white over a black using subjective and undefined criteria, as was the case here, can be an element of a prima facie since it is a circumstance that gives rise to an inference of discrimination.

7. In short, there can be no serious question but that under the rule of McDonnell Douglas, Furnco, Sweeny, and Burdine plaintiff made out a prima facie case here. To hold otherwise would be to overrule this line of decisions, a result, as we have shown above, that would be

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87/ Such a result would be particularly inappropriate in a federal government case, since Congress specifically has mandated the use of objective performance standards because of the discriminatory potential of subjectivity in promotion decisions. See, supra, pp. 56-67, n.54.

inconsistent with the policy of Title VII and with Congress' intent as demonstrated by the legislative history of the Act. Petitioner's arguments, based as they are on invalid views of the nature, depth, and pervasiveness of employment discrimination, must be rejected.

Conclusion

For the foregoing reasons, the decision of the court below should be affirmed.

Respectfully submitted,

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Appendix

42 U.S.C. § 2000e-16.

(a) All personnel actions affecting employees or applicants for employment (except with regard to aliens employed outside the limits of the United States) in military departments as defined in section 102 of title 5, United States Code, in executive agencies (other than the General Accounting Office) as defined in section 105 of title 5, United States Code (including employees and applicants for employment who are paid from nonappropppriated funds), in the United States Postal Service and the Postal Rate Commission, in those units of the Government of the District of Columbia having positions in the competitive service, and in those units of the legislative and judicial branches of the Federal Government having positions in the competitive service, and in the Library of Congress shall be made free from any discrimination based on race, color, religion, sex, or national origin.

(b) Except as otherwise provided in this subsection, the Civil Service Commission* shall have authority to enforce the provisions of subsection (a) through appropriate remedies, including reinstatement or hiring of employees with or without back pay, as will effectuate the policies of this sec-

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* Now the Equal Employment Opportunity Commission. See the President's Reorganization Plan No. 1 of 1978.

tion, and shall issue such rules, regulations, orders and instructions as it deems necessary and appropriate to carry out its responsibilities under this section. The Civil Service Commission shall --

(1) be responsible for the annual review and approval of a national and regional equal employment opportunity plan which each department and agency and each appropriate unit referred to in subsection (a) of this section shall submit in order to maintain an affirmative program of equal employment opportunity for all such employees and applicants for employment;

(2) be responsible for the review and evaluation of the operation of all agency equal employment opportunity programs, periodically obtaining and publishing (on at least a semiannual basis) progress reports from each such department, agency, or unit; and

(3) consult with and solicit the recommendations of interested individuals, groups, and organizations relating to equal employment opportunity.

The head of each such department, agency, or unit shall comply with such rules, regulations, orders, and instructions which shall include a provision that an employee or applicant for employment shall be notified of any final action taken on any complaint of discrimination filed by him thereunder. The plan submitted by each department, agency, and unit shall include, but not be limited to --

(1) provision for the establishment of training and education programs designed to provide a maximum opportunity for employees to advance so as to perform at their highest potential; and

(2) a description of the qualifications in terms of training and experience relating to equal employment opportunity for the principal and operating officials of each such department, agency, or unit responsible for carrying out the equal employment opportunity program and of the allocation of personnel and resources proposed by such department, agency, or unit to carry out its equal employment opportunity program.

With respect to employment in the Library of Congress, authorities granted in this subsection to the Civil Service Commission shall be exercised by the Librarian of Congress.

(c) Within thirty days of receipt of notice of final action taken by a department, agency, or unit referred to in subsection 717(a), or by the Civil Service Commission upon an appeal from discrimination based on race, color, religion, sex or natinal origin, brought pursuant to subsection (a) of this section, Executive Order 11478 or any succeeding Executive orders, or after one hundred and eighty days from filing of the intial charge with the department, agency, or unit or with the Civil Service Commission on appeal from a

decision or order of such department, agency, or unit until such time as final action may be taken by a department, agency, or unit, an employee or applicant for employment, if aggrieved by the final disposition of his complaint, or by the failure to take final action on his complaint, may file a civil action as provided in section 706, which civil action the head of the department agency, or unit, as appropriate, shall be the defendant.

(d) The provisions of section 706(f) through (k), as applicable, shall govern civil actions brought hereunder.

(e) Nothing contained in this Act shall relieve any Government agency or official of its or his primary responsibility to assure nondiscrimination in employment as required by the Constitution and statutes or of its or his responsibilities under Executive Order 11478 relating to equal employment opportunity in the Federal Government. (July 2, 1964, P.L. 88-352, Title VII, § 717, as added Mar. 24, 1972, P.L. 92-261, §11, 86 Stat. 111.)

Amicus Brief

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No. 81-1044

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

UNITED STATES POSTAL
SERVICE BOARD OF GOVERNORS,

Petitioner,

—v.—

LOUIS H. AIKENS,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF OF THE AMERICAN CIVIL LIBERTIES UNION AND COALITION OF BLACK TRADE UNIONISTS, *AMICI CURIAE*

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TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	iii
INTEREST OF AMICI CURIAE	1
STATEMENT OF THE CASE...	3
SUMMARY OF ARGUMENT	4
ARGUMENT	9
PETITIONER'S PROPOSAL SHOULD BE REJECTED AS CONTRARY TO WELL-FORMULATED TITLE VII ANALYSIS AND AS INCONSISTENT WITH THE BURDEN OF PROOF ALLOCATION ESTABLISHED BY NUMEROUS DECISIONS OF THIS COURT.....	9
A. Use Of Subjective Criteria Has Emerged As A Major Barrier To Fair Employment Practices	9
B. The McDonnell Douglas Prima Facie Case Governs Situations Involving Subjective Assessments, Which Plaintiffs Cannot Be Expected To Prove	13

Page

C. As The Quantity And Quality Of Plaintiffs' Proof Increases, The Burdens Of Rebuttal On Defendant Increase Concommitantly..... 27

CONCLUSION..... 37

TABLE OF AUTHORITIES

CASES: Page

Albemarle Paper Co. v. Moody, 422 U.S. 405 (1975)..... 11

Barnett v. W.T. Grant Co., 518 F.2d 543 (4th Cir. 1975).... 20

Brady v. Allstate Insurance Co., ___ F.2d ___, 29 FEP Cases 213 (4th Cir. 1982)..... 24

Brown v. Ford Motor Co., 19 EPD ¶8969 (N.D.Ga. 1978)..... 22

Christman v. American Cyanamid Co., Civil Action No. 80-0024-P (N.D.W.Va.)..... 10

Claiborne v. Illinois Central R.R., 583 F.2d 143 (5th Cir. 1978), cert. denied 442 U.S. 934 (1979).....9

Coble v. Hot Springs School Dist., ___ F.2d ___, 29 FEP Cases 201 (8th Cir. 1982) 16, 20, 21, 23

Diaz v. Pan American World Airways, Inc., 442 F.2d 385 (5th Cir.), cert. denied 404 U.S. 950 (1971)...18

Dothard v. Rawlinson, 433 U.S. 321 (1977)..... 10, 11

EEOC v. American National Bank, 652 F.2d 1176 (4th Cir. 1981), petition for cert. filed, 51 U.S.L.W. 3005 (U.S. June 25, 1982) (No. 81-2358)..... 33

Page

EEOC v. Bumble Bee Seafoods Company, 19 EPD ¶9160 (D. Or. 1979).....22

EEOC v. Colby College, 589 F.2d 1139 (1st Cir. 1978) 10

EEOC v. Magnetics Division of Spang Industries, 13 FEP Cases 191 (W.D.Pa. 1976) 22

Fernandez v. Wynn Oil Co., 653 F.2d 1273 (9th Cir. 1981).....18

Griggs v. Duke Power Co., 401 U.S. 424 (1971) 10-12, 14

Harkless v. Sweeney Indep. School Dist., 554 F.2d 1353 (5th Cir.), cert. denied 434 U.S. 966 (1977).....9, 21

Hatton v. Ford Motor Co. 508 F.Supp. 620 (E.D. Mich. 1981).... 16

Hazelwood School Dist. v. United States, 433 U.S. 299 (1977)...7, 29,31

International Brotherhood of Teamsters v. United States 431 U.S. 324 (1977) 7, 29-31, 33

McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973).....4, 6, 7, 24, 27, 28, 35

Nashville Gas Co. v. Satty, 434 U.S. 136 (1977) 34

Page

Norris v. Arizona Governing Committee, etc., 671 F.2d 330 (9th Cir.), Petition for cert. filed, 51 U.S.L.W. 3013 (U.S. July 27, 1982) (No. 82-52) 10

Parker v. Baltimore & Ohio Railroad, 652 F.2d 1012 (D.C. Cir. 1981)..... 24

Phillips v. Martin-Marietta Corp., 400 U.S. 542 (1971)..... 9

Robbins v. White-Wilson Medical Clinic, 660 F.2d 1064 (5th Cir. 1981), vacated and remanded, 50 U.S.L.W. 3915 (U.S. May 17, 1982).....20

Rucker v. Higher Educational Aids Board, 669 F.2d 1179 (7th Cir. 1982).....18

Segar v. Civiletti, 508 F. Supp. 690 (D.D.C. 1981)..... 21

Smallwood v. United Airlines, 661 F.2d 303 (4th Cir. 1981) cert. denied 50 U.S.L.W.3948 (U.S. June 1, 1982) (No. 81-1883).....17

Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248 (1981).....4, 28, 34, 35

Wade v. Mississippi Coop. Ext. Service, Inc., 528 F.2d 508 (5th Cir. 1976).....20

Page

Williams v. Colorado Springs, Colo. School Dist., 641 F.2d 835 (10th Cir. 1981)..... 20

Wilson v. Southwest Airlines Company, 517 F. Supp. 292 (N.D. Tex. 1981).....18

STATUTES:

Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§2000e, et seq. .....passim

INTEREST OF AMICI CURIAE*

The American Civil Liberties Union (ACLU) is a nationwide, nonpartisan organization of over 250,000 members which is dedicated to protecting the fundamental rights of the people of the United States, including the right to equal treatment under the law. One of the major civil liberties issues still facing the United States is the elimination of all vestiges of racism and sexism, and the wholly justified demand of women and minorities for access to opportunities from which they have so long been excluded.

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* The parties have consented to the filing of this brief, and their letters of consent are being filed with the Clerk of Court pursuant to Rule 36.2 of the Rules of this Court.

In numerous cases before this Court, the ACLU has challenged discrimination against minorities and women under the Fifth and Fourteenth Amendments, and has also urged the full enforcement of Title VII of the Civil Rights Act of 1964 to remedy the causes and effects of such prohibited and invidious discrimination.

The Coalition of Black Trade Unionists (CBTU) is a national, nonpartisan organization of over 12,000 members which is dedicated to protecting and promoting the fundamental rights of workers in general, women, minorities and black workers in particular, including the right to equal treatment under the law. Recognizing that limitations on opportunities constitute a pervasive problem, the CBTU continues to work toward the

elimination of all forms of discrimination.

Amici believe that the approach advocated by the petitioner and its supporting amici in this case, the imposition of additional requirements to the well-established formulation of a prima facie case of individual employment discrimination, poses an issue of great importance to the preservation of Title VII, and must be rejected as inconsistent with congressional intent, this Court's prior teaching, and as unworkable and analytically unsound.

STATEMENT OF THE CASE

Amici rely on the Statement of the Case set out in Brief for Respondent.

SUMMARY OF ARGUMENT

Petitioner and amici curiae America Federation of Labor and Congress of Industrial Organization (AFL-CIO) and Equal Employment Advisory Council (EEAC), assuming the propriety of subjective job selection criteria, urge this Court to require plaintiffs in individual disparate treatment cases to prove something more than is required under this Court's well-established formulation of the Title VII prima facie case. See McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973), and Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248 (1981). Petitioner's proposal, however, ignores the discriminatory abuses inherent in subjective decision-making processes. The proposal is thus fatally flawed in its failure to distinguish cases in which employers rely on objective

criteria in making employment decisions from those involving subjective assessments, which all too often offer the greatest potential for masked expression of racial or sexual bias.

Because of the crucial distinctions between objective and subjective criteria, the ACLU and CBTU amici curiae submit that the approach suggested by the petitioner would be inherently unworkable in the trial courts, for it would require plaintiffs to prove subjective qualifications that, by definition, are not susceptible to objective proof. It also would require plaintiffs to anticipate an employer's subjective rationale before the employer has formulated or decided upon the rationale; and it would require plaintiffs in discrete and contained

individual cases to resort to class-wide discovery and proof techniques which would unnecessarily expand both discovery and trial. These arguments blur the analytical and practical distinctions between class and individual cases and wrongly assume that the defendant's burden remains static regardless of what the plaintiff proves.

Amici ACLU and CBTU believe that in individual cases the burden of proof formulation set forth by this Court in McDonnell Douglas properly acknowledges congressional intent to eradicate discrimination in all its forms, and offers sufficient flexibility to discern discrimination in the various guises it may assume. The model properly allocates the shifting burden of proof and production to the party in possession of the

requisite proof, and it contemplates a progressively intensifying inquiry as required by the increasing persuasiveness of the proof. The McDonnell Douglas model, however, was not developed and has not been applied by the Court to analyze class-wide disparate treatment cases, in which the nature of the proof is entirely different, and different models have thus been applied. Hazelwood School District v. United States, 433 U.S. 299 (1977); International Brotherhood of Teamsters v. United States, 431 U.S. 324 (1977). The same principle controls both situations: the burden on rebuttal must correspond to the nature and extent of plaintiff's prima facie case.

The briefs of petitioner and supporting amici confuse basic Title VII concepts and urge this Court to adopt rigid rules which would contravene congressional intent and the teachings of this Court. Amici ACLU and CBTU oppose these suggestions and submit that this case presents no compelling reasons to depart from established precedent.

ARGUMENT

PETITIONER'S PROPOSAL SHOULD BE REJECTED AS CONTRARY TO WELL-FORMULATED TITLE VII ANALYSIS AND AS INCONSISTENT WITH THE BURDEN OF PROOF ALLOCATION ESTABLISHED BY NUMEROUS DECISIONS OF THIS COURT

A. Use Of Subjective Criteria Has Emerged As A Major Barrier To Fair Employment Practices

Employment discrimination and litigation to combat it have entered a new era. In 1965 when Title VII became effective, overt discriminatory practices were commonplace, e.g., Phillips v. Martin-Marietta Corp., 400 U.S. 542 (1971); Claiborne v. Illinois Central R.R., 583 F.2d 143 (5th Cir. 1978), cert. denied 442 U.S. 934 (1979); Harkless v. Sweeney Indep. School Dist., 554 F.2d 1353 (5th Cir.), cert. denied, 434 U.S. 966 (1977), as were diploma

requirements and standardized screening devices which disproportionately excluded certain classes of individuals. See, respectively, Griggs v. Duke Power Co., 401 U.S. 424 (1971), and Dothard v. Rawlinson, 433 U.S. 321 (1977).

Judicial enforcement of our national commitment to equality of individual opportunity has virtually eliminated overt discrimination in employment.[1/] And many forms of invidious testing and screening practices have likewise been

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1/One exception is discrimination against women of child-bearing capacity. See Christman v. American Cyanamid Co., Civil Action No. 80-0024-P(N.D.W.Va.). In the area of pensions and insurance, sex-based actuarial tables are still commonly used. Norris v. Arizona Governing Committee, etc., 671 F.2d 330 (9th Cir.), petition for cert. filed, 51 U.S.L.W. 3013 (U.S. July 27, 1982) (No. 82-52); EEOC v. Colby College, 589 F.2d 1139 (1st Cir. 1978).

successfully curbed. Id.; Albemarle Paper Co. v. Moody, 422 U.S. 405 (1975). But, rather than devising new job-related tests, many employers have adopted undefined subjective selection processes. These in turn pose new analytical problems. By their nature they may conceal the most difficult and evasive form of discrimination: the hidden, subtle and possibly subconscious preferences of the decision-makers to select others with their own cultural experience and background. The failure to identify objective qualities essential to job performance, and the reliance instead on "subjective" factors, which cannot be validated and which may bear little or no relevance to successful job performance, characterize this subtle but equally invidious form of discrimination. Cultural bias, whether

incorporated in tests or individual decision-making, is precisely the kind of "built-in headwind[]" Title VII was intended to eliminate. Griggs v. Duke Power Co., 401 U.S. at 432.

Petitioner and amici for petitioner assume that these subjective factors are per se "legitimate non-discriminatory reasons" to prefer one employee or another. We dispute that assumption and urge this Court to distinguish between employer reliance on subjective, as opposed to objective, validated criteria; to reaffirm proof burdens appropriate to these two highly distinct situations; and to recognize further distinctions between proof burdens in individual and class-wide cases.

B. The McDonnell Douglas Prima Facie Case Governs Situations Involving Subjective Assessments, Which Plaintiffs Cannot Be Expected To Prove

Objective employment criteria are capable of clear, unequivocal identification in discovery and proof at trial. Either an employer does or does not require a high school diploma; an applicant does or does not have a high school diploma; and the diploma requirement is or is not related to job performance. The diploma requirement, if imposed, is ordinarily applied to all applicants in the same fashion, and its impact on applicants or others generally can be determined. In order to implement objective criteria in a professional fashion, important elements of job performance must be identified, and the

criteria must in fact measure the necessary abilities.

Subjective criteria, in contrast, cannot be easily identified or quantified, nor can their presence or absence be proved or disproved. The subjective assessment by definition varies infinitely in its application among applicants. No careful job analysis informs the subjective preference for certain personality traits.[2/] Individuals who

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2/Even the preference for the employee with greater objective qualifications may be uninformed and unrelated to job performance. For example, in Griggs, the employer used testing and diploma requirements in order to select the most qualified applicants, even though those requirements did not relate to job performance. Similarly, an employer who does not formally impose a degree requirement but awards employment to the applicant with the highest degree is practicing the same evil condemned in Griggs, if fewer minorities or women possess that qualification.

screen applicants are rarely trained in job analysis and may substitute untutored bias for a rational approach to decision-making. For example, personnel officers may simply decide in the abstract that ambition or perseverance are good qualities in all employees. But how can they measure these qualities? They may unconsciously prefer applicants who have graduated from the "right" school, even though no degree requirement is formally imposed. Worse, they may consciously or unconsciously prefer applicants who most resemble themselves.

Because the subjective decision-making process is so fluid and variable, employers who use it can rarely identify in discovery any general rules of application. Rather, each situation has

its own rules. In one case the applicant with greater experience is selected over another with greater education, e.g., Coble v. Hot Springs School Dist., ___ F.2d ___, 29 FEP Cases 201 (8th Cir. 1982), and the reverse may be true on another occasion; in a third instance, force of personality prevails, or the fact that the employer is a friend of the applicant's uncle. In some cases, multiple issues abound, cf. Hatton v. Ford Motor Co., 508 F. Supp. 620 (E.D. Mich. 1981), and the employer cannot and does not clearly articulate a definitive reason

for the selection until trial.[3/]

In all of these cases, the applicant cannot demonstrate that s/he has the desired qualities, because such qualities continuously change, and assessment of the applicant lies uniquely within the subjective judgment of the interviewer. Qualifications cannot be proved if "[t]he applicant is 'qualified' for a job only if she is 'qualified' in the subjective judgment" of the employer. AFL-CIO Brief at 12.

3/Contrary to Petitioner's suggestion, discovery does not yield clear and final explanations for most employment decisions. Instead employers routinely identify only the nature of their considerations. The specific reasons often shift during discovery and even at trial. E.g., Smallwood v. United Airlines, 661 F.2d 303 (4th Cir. 1981), cert. denied, 50 U.S.L.W. 3948 (U.S. June 1, 1982) (No. 81-1883).

For all these reasons, the subjective decision-making process invites abuse and the expression of individual or cultural bias. The examples in the AFL-CIO's brief are illustrative. The AFL-CIO posits that law firms may consider a lawyer applicant's "ability to get along with clients." Id. When this same quality is called "customer preference," however, it has never been condoned,[4/] and for good reason: it would authorize white businesses catering to a white clientele in certain regions of the country to exclude black employees from

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4 /See, e.g., Rucker v. Higher Educational Aids Board, 669 F.2d 1179 (7th Cir. 1982); Fernandez v. Wynn Oil Co., 653 F.2d 1273 (9th Cir. 1981); Diaz v. Pan American World Airways, Inc. 442 F.2d 385 (5th Cir.)cert. denied 404 U.S. 950 (1971); Wilson v. Southwest Airlines Company, 517 F. Supp. 292 (N.D. Tex. 1981).

all "public" positions. The excuse has long been offered to perpetuate stereotypes about women's incompetence in business affairs. The potential for abuse in such an approach is patent, as is the fact that under this approach an applicant could never prove equal or greater qualifications, since the subjective elements cannot be quantified or measured. 5/

5/Petitioner's own argument graphically reveals the inadequacy and unfairness of its proposal. The Government concedes that Aikens had "impressive credentials." Brief for the Petitioner, at 22, n. 17. In fact, Aikens had a Master of Arts and many successful years of managerial experience. See, generally, Brief for Respondent, Statement of the Case. On all objective bases, he was more qualified than the successful applicants. Yet petitioner argues that it should not even have to present the minimal Burdine defense because Aikens did not prove he was as qualified as the successful candidates in any of a variety of unprovable, unspecified, subjective respects, particularly with regard to the employer's subjective judgment comparing objective qualifications.

Numerous courts have recognized the abuses inherent in subjective decision-making procedures. See Coble v. Hot Springs School Dist., 29 FEP Cases at 205; Williams v. Colorado Springs, Colo. School Dist., 641 F.2d 835,842 (10th Cir. 1981); Wade v. Mississippi Coop. Ext. Service, Inc., 528 F.2d 508,518 (5th Cir. 1976); Barnett v. W.T. Grant Co., 518 F.2d 543,550 (4th Cir. 1975). Subjective assessments may incorporate racial or sexual stereotypes. "[The interviewer] had a tendency to equate pleasant personality characteristics, and particularly an ability to work well with others, with white people." Robbins v. White-Wilson Medical Clinic, 660 F.2d 1064,1068 (5th Cir. 1981), vacated and remanded on

other grounds, 50 U.S.L.W. 3915 (U.S. May 17, 1982)(No. 81-1800). "Black agents who do not conform to the expectations White agents and especially their White group supervisors have about them, are criticized for being too aggressive and too abrasive" on supervisory evaluations for promotions. Segar v. Civiletti, 508 F. Supp. 690,706 (D.D.C.1981). See Harkless v. Sweeny Indep. School Dist., 554 F.2d at 1355. See also Coble v. Hot Springs School Dist., 29 FEP Cases at 205.

Petitioner and amici for petitioner suggest that in all these situations the plaintiff must prove as part of the prima facie case that s/he was as or more qualified as the person selected. While it may be feasible for a plaintiff to prove equal or greater objective

qualifications, it is impossible to prove anything about subjective qualities,[6]

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[6] /Nor would it make sense to require plaintiffs in such situations to prove intentional discrimination in some other way, such as through introduction of historical or class-wide data. Petitioner disingenuously suggests that class-wide discovery is always available, but it and other employers would undoubtedly be quick to object to producing 15 or 20 years of historical data on the ground that it is irrelevant and burdensome. The casebooks are replete with such arguments, which are not infrequently sustained. See, e.g., EEOC v. Bumble Bee Seafoods Company, 19 EPD ¶9160 (D. Or. 1979); Brown v. Ford Motor Company, 19 EPD ¶8969 (N.D. Ga. 1978); EEOC v. Magnetics Division of Spang Industries, 13 FEP Cases 191 (W.D.Pa. 1976). Moreover, such data may not always be available or probative. Statistical analysis of the sort used to prove class claims may require examinations of hundreds or thousands of applicant or employee files, coding relevant information from each, keypunching the information in computer-readable form, creation of master computer tape, and ultimately analysis through multiple regression or similar techniques.

(footnote continued on following page)

other than to assert that one has the necessary personal attributes to perform successfully.[7/]

See Coble v. Hot Springs School District, 29 FEP Cases at 210. Although the exceedingly rare individual plaintiff who can afford this effort would enjoy a significant advantage, it would be excessive to require such a showing in a simple and individualized case in which one person asserts s/he should have been selected instead of another.

7/Arguably this would require the trial judge to decide which applicant had a more pleasant personality, etc.

The McDonnell Douglas decision and its progeny[8] contemplate a realistic and equitable approach in a simple but fluid mode of analysis which adapts to different circumstances and which allocates the burdens of proof and production according to the nature of the proof and who has greatest access to it. Thus, while the plaintiff may be expected to prove, inter alia, his or her objective, measurable or quantifiable qualifications (for example, years of education,

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8/ Petitioner and its amici contend that the McDonnell Douglas prima facie case imposes too light a burden on plaintiffs. However, as two courts of appeals recently noted, "The McDonnell Douglas test is not an arbitrary lightening of the plaintiff's burden, but rather a procedural embodiment of the recognition that our nation has yet not freed itself from a legacy of hostile discrimination." Parker v. Baltimore & Ohio Railroad, 652 F.2d 1012,1017 (D.C. Cir. 1981), quoted in Brady v. Allstate Insurance Co., ___ F.2d ___, 29 FEP Cases 213,215 (4th Cir. 1982).

grades, experience, references, etc.), s/he can never be expected to prove that s/he was more qualified in the subjective judgment of the decision-maker.[9/] For that, the burden of production must inevitably shift to the defendant, and, as shown above, subjective evaluation systems must be viewed with suspicion. Subjective judgments which override or substitute for a reasoned assessment of the requirements for a given job are inherently lacking in credibility and are suggestive of pretext. Thus, if the

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9/Comparative evaluation of objective qualifications is likewise a subjective matter, which the employer must explicate, at least initially.

plaintiff has shown equal or greater objective qualifications,[10] the employer

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10/This case does not present the question of whether a plaintiff must initially show equal or greater objective qualifications because Aikens made that showing. Even were that not true, it would be of little practical significance since it is a very minor burden indeed for the defendant to articulate the greater objective qualifications of the successful candidate as the reason for its decision. When objective qualifications are at issue the presentation of proof is usually a simple matter and frequently can be accomplished through documentary evidence, stipulations, or admissions. Assume, for example, that an employer advertises the requirements of a given job as a college degree with good grades, plus two to five years experience. Plaintiff establishes that s/he had the degree, a B^+ average and three years experience. If the selected individual turns out to have the degree, an A average and five years experience, the plaintiff will lose, because such standards, if uniformly applied, have inherent credibility, and are not overly subject to abuse, ad hoc variation or unspoken prejudices. Petitioner and supporting amici, however, argue for the reverse situation: that a plaintiff having equal or greater education and experience than the selected individual must, nonetheless, also prove on pain of dismissal at an early stage that s/he has a greater abundance of whatever subjective qualities are from time to time tacked on to these measurable qualities.

who relies upon subjective qualities should bear a heavy burden to justify such reliance.

C. As The Quantity And Quality Of Plaintiffs' Proof Increases, The Burdens Of Rebuttal On Defendant Increase Concommitantly

In any case, an employer is required to offer credible evidence that the reasons for the selection are both "legitimate" and "non-discriminatory." That these requirements have substantive connotations is clear from McDonnell Douglas. The proffered reason must have some "reasonable basis"; there, it was the fact that the employee had engaged in "deliberate unlawful activity" directed against the employer. 411 U.S. at 803. Unlawful activity not directed against the employer might not provide the same "legitimate justification for refusing to hire." Id. at 804, n. 17. Further, the reason must relate to a "rational

neutral business justification." Id. at 806, n. 20. And the reasons must be "applied alike to members of both races" or genders. Id. at 804. If the "assigned reason was . . . discriminatory in its application," the defense fails. Id. at 807.

In addition, the rebuttal must meet the level and kind of proof offered in the prima facie case,[11/] or it fails to "destroy the legally mandatory inference of discrimination," Burdine, 450 U.S.

11/Petitioner and supporting amici complain of defendant's burden under Burdine and confuse the "incentive" to prove its rebuttal with the legal requirement to do so. Brief for the Petitioner, at 31. Clearly if the chosen applicant is objectively more qualified than the plaintiff, for example, then the defendant's "burden" on rebuttal is "slight" indeed.

at 255, n. 10. And see Teamsters, 431 U.S. at 360, n. 46. The more extensive or persuasive the plaintiff's initial showing, the greater the rebuttal burden on defendant.

This principle is most graphically demonstrated in this Court's analysis of class-wide disparate treatment cases. Such cases typically arise from unstructured hiring procedures which rely heavily on the subjective judgment of supervisors or personnel officers, see, e.g., Teamsters, 431 U.S. at 335,338 and n. 19; Hazelwood, 433 U.S. at 301-02, with the result that there is a statistically significant disparity between the numbers of minorities or women actually hired or promoted and the numbers that would be expected, based upon their representation in the appropriate labor pool, if an unbiased

system were employed.[12/] Inherent in plaintiffs' proof is an analysis of the appropriate labor pool of qualified applicants or potential applicants.

12/This kind of case differs only slightly from the "disparate impact" model, in which an identifiable test or procedure is used to eliminate a disproportionate number of women or minorities. Here an apparently neutral personnel selection system without identifiable screening elements likewise results in a disproportionate exclusion of qualified minorities or women which cannot statistically be explained by chance. In each instance, the system is ostensibly neutral, but the result is discrimination. We submit these cases are analytically indistinguishable, and nothing in Title VII legislative history would authorize a lesser burden on defendant to justify an unstructured discriminatory system than would be required to sustain discriminatory testing practices.

See Hazelwood, 433 U.S. at 310-12. Such an analysis is commonly based upon the skills required for the job, the geographical pool from which applicants are drawn, and the racial or sexual or ethnic breakdown of the pool. Thus, the plaintiffs' analysis, if valid, anticipates and eliminates the common legitimate non-discriminatory reasons for failure to hire from the subject group: lack of qualifications and availability. Some cases are buttressed by evidence of overt discriminatory acts, e.g., Teamsters, 431 U.S. at 338, but this Court has never imposed such a requirement in the prima facie showing, see, e.g., Hazelwood, 433 U.S. at 307, nor would it be consistent with the Title VII precept that bars practices fair in form but discriminatory in operation.

Defendants burden on rebuttal is clearly more significant in such a case, since the prima facie case has already anticipated the common defenses.[13] In Teamsters this Court held that the defendant must demonstrate that the plaintiff's proof "is either inaccurate or insignificant," and stated that "the focus often will not be on individual hiring decisions, but on a pattern of discriminatory decision-making." 431 U.S. at 360 and n. 46. Thus, ordinarily in such a statistical case, the defendant

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13/Similarly, if plaintiff has anticipated other defenses and proved pretext initially, defendants' burden on rebuttal is concommitantly greater in order to mount a successful rebuttal.

must directly address the validity of the statistical evidence and must do so with more than mere assertions or allegations.[14/] See, e.g., EEOC v. American National Bank, 652 F.2d 1176 (4th Cir. 1981), petition for cert. filed, 51 U.S.L.W. 3005 (U.S. June 25, 1982) (No. 81-2358).

Thus, whether the plaintiff presents his/her case as a strictly individual problem or as an aspect of discrimination against a class of which s/he is a member,

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14/In addition, a finding of liability to a class of which plaintiff is a member would create a presumption that the plaintiff also suffered discrimination, and the burden of proof would then shift to defendant to rebut this presumption in the remedy phase. Teamsters, 431 U.S. at 362.

defendant's burden on rebuttal increases as the prima facie case anticipates defenses or eliminates rational reasons for the selection decisions. Progressively, mere "articulation" becomes by definition unworthy of credibility and thus legally insufficient. It may suffice only when the plaintiff has met the most minimal burden, at which point articulation of some legitimate nondiscriminatory reason may rebut the inference of discrimination created by the prima facie case.[15] However, the

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15/The AFL-CIO Brief at 4-5, misleadingly suggests that upon only an equivocal showing a plaintiff may prevail on the merits. This is true, of course, only if the defendant offers no response whatsoever. Burdine, 450 U.S. at 254. In such a situation, the Court may properly assume that no explanation exists. Nashville Gas Co. v. Satty, 434 U.S. 136,143 (1977).

burden upon defendant increases with the strength of plaintiffs' proof. Specifically, this burden involves the necessity to rebut statistical evidence and the necessity to demonstrate that reasons offered to justify a selection are legitimate in that they advance business-related purposes and are not applied in a non-discriminatory fashion.

Petitioner and amici for petitioner thus, perhaps unwittingly, are increasing the necessary, as opposed to elective, burden on defendants, if they succeed in increasing plaintiffs' prima facie burden. The easily rebuttable cases are just that: easily rebuttable, taking minimal amounts of court time if conducted as envisioned in McDonnell Douglas and Burdine. But if plaintiffs

are required to make major historical, statistical, comparative cases out of relatively simple ones, many will do so. All Title VII cases will thus become major litigations, and only the lawyers will win.

CONCLUSION

For the foregoing reasons, *amici* respectfully submit that the judgment of the Court of Appeals below should be affirmed.

Respectfully submitted,

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* We wish to thank Shawn P. Leary and Marcella Silverman of New York University School of Law for their assistance on this brief.

Amicus Brief

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No. 81-1044

IN THE
Supreme Court of the United States
OCTOBER TERM, 1981

UNITED STATES POSTAL SERVICE
BOARD OF GOVERNORS,
Petitioner,
v.
LOUIS H. AIKENS,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia

MOTION FOR LEAVE TO FILE A BRIEF AS AMICUS CURIAE AND BRIEF FOR THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATION AS AMICUS CURIAE

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MOTION BY THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS FOR LEAVE TO FILE A BRIEF AS AMICUS CURIAE

The American Federation of Labor and Congress of Industrial Organizations (AFL-CIO), respectfully moves this Court for leave to file the accompanying brief *amicus curiae*.

INTEREST OF THE AFL-CIO AND THE ISSUE TO BE COVERED IN THE ATTACHED BRIEF AMICUS CURIAE

The AFL-CIO is a federation of 101 national and international unions having a total membership of 14,500,000 working men and women of all races, colors, religions and national origins.

Litigation under Title VII of the Civil Rights Act of 1964 is a central means for regulating the employment relationship. That litigation, in which unions take part both as plaintiffs and defendants, has a major impact on the labor movement and on its members. And unions and their members in common with all those affected by Title VII benefit by governing rules that improve the trial courts' capacity to determine the facts.

It is our position, developed in the attached brief, that as the instant case shows, the present criteria for determining when a Title VII plaintiff who has brought a disparate treatment suit has established a prima facie case impede rather than facilitate the proper functioning of the fact-finding process. The office of our brief *amicus curiae* is to suggest an approach better suited to determining the ultimate question in such cases—whether the plaintiff has made a sufficient showing of discriminatory intent.

CONCLUSION

For the above stated reasons, this motion for leave to file a brief *amicus curiae* should be granted.

Respectfully submitted,

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TABLE OF CONTENTS

	Page
INTRODUCTION AND SUMMARY OF ARGUMENT	1
ARGUMENT	3
CONCLUSION	18

TABLE OF AUTHORITIES

Cases

Abrams v. Johnson, 545 F.2d 1226 (6th Cir. 1976) 8, 9

Adams v. Reed, 16 FEP Cases 1040 (5th Cir. 1978) 15

Arlington Heights v. Metropolitan Housing Corp., 429 U.S. 252 ..... 2, 17, 18

Banerjee v. Board of Trustees of Smith College, 495 F.Supp. 1148 (D. Mass. 1980) 10

Benton v. Blair, 228 F.2d 55 (5th Cir. 1956) 5

Blizard v. Fielding, 572 F.2d 13 (1st Cir. 1978) 15

Briscoe v. Director, Admin. Office of the United States Courts, 20 FEP Cases 516 (D.D.C. 1977) 8, 9

Canty v. Olivarez, 452 F.Supp. 762 (N.D. Ga. 1978) 8, 10

Capers v. Long Island R.R., 573 F.2d 1291 (S.D. N.Y.), *aff'd sub nom.* Harris v. Long Island R.R. (2d Cir. 1977) 8

Colston v. Pingree, 498 F.Supp. 327 (N.D. Fla. 1980) 8

Commissioner v. Duberstein, 363 U.S. 278 ..... 17, 18

Crawford v. Western Electric, 614 F.2d 1300 (5th Cir. 1980) 9

Davis v. Califano, 613 F.2d 957 (D.C. Cir. 1979) 9, 10, 16

Davis v. Weidner, 596 F.2d 726 (7th Cir. 1979) 8, 9, 15

Daye v. Harris, 655 F.2d 258 (D.C. Cir. 1981) 9, 15

EEOC v. Tufts Institution of Higher Learning, 421 F.Supp. 152 (D. Mass. 1975) 16

Emerson Electric Co. v. Farmer, 427 F.2d 1082 (5th Cir. 1970) 5

TABLE OF AUTHORITIES—Continued

Page

Flowers v. Crouch-Walker, 552 F.2d 1277 (7th Cir. 1977) 8, 9, 15
Folkins v. NLRB, 500 F.2d 52 (9th Cir. 1974) 15
Frausto v. Legal Aid Society of San Diego, 563 F.2d 1324 (9th Cir. 1977) 10, 12, 15
Frink v. U.S. Navy, 16 FEP Cases 67 (E.D. Pa. 1977) 9, 10
Furnco Construction Corp. v. Waters, 438 U.S. 567 ..... 3, 5
Hagans v. Andrus, 25 FEP Cases 502 (9th Cir. 1981) 8
Henry v. Ford Motor Co., 553 F.2d 46 (8th Cir. 1977) 9, 15
Hernandez v. Western Electric, 23 FEP Cases 1244 (S.D. Tex. 1978) 8
Hickman v. Taylor, 329 U.S. 495 14
Hochstadt v. Worcester Foundation for Experimental Biology, 425 F.Supp. 318 (D. Mass), *aff'd* 545 F.2d 222 (1st Cir. 1976) 8
Krajewski v. NLRB, 413 F.2d 673 (1st Cir. 1969) .. 15
Lieberman v. Gant, 630 F.2d 60 (2d Cir. 1980) .. 9, 10, 16
McDonnell Douglas Corp. v. Green, 411 U.S. 792 ..... *passim*
Metcalf v. Omaha Steel Castlings Co., 507 F.Supp. 679 (D. Neb. 1981) 8
Miller v. Williams, 590 F.2d 317 (9th Cir. 1979) .. 8
Minor v. Lakeview Hospital, 434 F.Supp. 633 (E.D. Wis. 1977), *aff'd* 582 F.2d 1284 (7th Cir. 1978) 8
Morales v. Dain, Kalman & Quail, 467 F.Supp. 1031 (D. Minn. 1979) 9
Mosby v. Webster College, 563 F.2d 901 (8th Cir. 1977) 15
Mosley v. United States, 425 F.Supp. 50 (N.D. Cal. 1977) 9
Nakagawa v. Reed, 20 FEP Cases 481 (D. D.C. 1977) 9
NLRB v. Camco, Inc., 369 F.2d 125 (5th Cir. 1966) 15
Oliver v. Moberly Missouri Sch. Dist., 427 F. Supp. 82 (E.D. Mos. 1977) 9, 10

TABLE OF AUTHORITIES—Continued

	Page
Olson v. Philco-Ford, 531 F.2d 474 (10th Cir. 1976)	15
Osborne v. Cleland, 620 F.2d 195 (8th Cir. 1980)	8
Pettit v. United States, 488 F.2d 1026 (Ct. Cl. 1973)	8
Pinckney v. County of Northampton, 512 F.Supp. 989 (E.D. Pa. 1981), *appeal pending*, No. 81-1887 (3d Cir.)	8, 9
Powell v. Syracuse University, 580 F.2d 1150 (2d Cir. 1978), *cert. denied* 439 U.S. 984 (1979)	9
Pullman-Standard v. Swint, 50 L.W. 4425 (1982)	2, 4, 17
Ruckey v. Essex International, 14 FEP Cases 406 (N.D. Ind. 1976)	8
Sanders v. Sherwin-Williams, 495 F.Supp. 571 (E.D. Mich. 1980)	15
Sime v. Trustees of California State University and Colleges, 526 F.2d 1112 (9th Cir. 1975)	15
Sklenar v. Central Board of Education, 497 F. Supp. 1154 (E.D. Mich. 1980)	8, 9, 10
Teamsters v. United States, 431 U.S. 324	3, 6
Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248	2, 3, 4, 6, 15, 16
Watson v. Magee Women's Hospital, 472 F.Supp. 325 (W.D. Pa. 1979)	16
Woods v. North American Rockwell Corp., 480 F.2d 644 (10th Cir. 1973)	5
Worthy v. United States Steel, 616 F.2d 698 (3d Cir. 1980)	8, 15
Wright v. National Archives & Records Service, 609 F.2d 702 (4th Cir. 1979)	8

Constitution and Statutes:

Constitution of the United States:	
Fourteenth Amendment	2, 17
Civil Rights Act of 1964, Title VII, 42 U.S.C. § 2000e:	
§ 703(a)(1), 42 U.S.C. § 2000e-2(a)(1)	1-2, 3, 4
§ 703(h), 42 U.S.C. § 2000e-2(h)	4, 17

TABLE OF AUTHORITIES—Continued

Rules: Page

Federal Rules of Civil Procedure:

Rules 26-37 14
Rule 41(b) 4, 5, 13

Miscellaneous:

5 Moore's Federal Practice, ¶¶ 41.13[3]-[4] 5
9 Wright & Miller, Federal Practice and Procedure, § 2371 (1971) 5

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BRIEF FOR THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS AS AMICUS CURIAE

This brief *amicus curiae* is filed contingent on the granting of the foregoing motion for leave to file said brief. The interest of the AFL-CIO in this case is set forth in that motion.

INTRODUCTION AND SUMMARY OF ARGUMENT

In *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 the Court set out a four factor showing by which a plaintiff may carry his burden of establishing a prima facie case of intentional discrimination under § 703(a)

(1) of Title VII of the Civil Rights Act of 1964. And in *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 254, the Court explained the litigation significance of establishing such a prima facie case: "If the trier of fact believes the plaintiff's evidence, and if the employer is silent in the face of [that evidence], the court must enter judgment for the plaintiff because no issue of fact remains in the case."

The *McDonnell Douglas* criteria have taken on an existence of their own, generating a debate in the lower courts as to their scope of application and as to the meaning of the individual component parts. That debate has tended to impede rather than to facilitate the trial courts' ability to correctly answer the ultimate question posed in a disparate treatment case such as this—has the employer acted for discriminatory reasons.

This case presents an opportunity, and an example of the need, to refocus the requirements for establishing such a prima facie case and by so doing to make the fact finding process in cases brought under § 703(a)(1) more precise and less complex.

For the reasons we develop herein, we respectfully suggest that the cause of reliable factfinding would be best served were the Court to remove all mediating constructs from the factual analysis in disparate treatment cases and simply to mandate a straightforward inquiry into the question of discriminatory intent, based on all relevant evidence in whatever form it may come. That is the approach the Court has taken with respect to proof of discriminatory intent under the Fourteenth Amendment. See *Arlington Heights v. Metropolitan Housing Corp.*, 429 U.S. 252, 262, 266-268. And the Court has followed that same approach with respect to the determination of discriminatory intent under § 703(h) of Title VII. See *Pullman-Standard v. Swint*, —— U.S. ——, 50 L.W. 4425, 4427 n.8, 4429-4430 (April 27, 1982).

ARGUMENT

1. Section 703(a)(1) makes it "an unlawful employment practice for an employer * * * to fail or refuse to hire [or to promote] any individual * * * because of such individual's race, color, religion, sex or national origin * * *." As this Court has explained, the conduct prohibited by § 703(a)(1), "disparate treatment,"

> is the most easily understood type of discrimination. The employer simply treats some people less favorably than others because of their race, color, religion, sex, or national origin. Proof of discriminatory motive is critical, although it can in some circumstances be inferred from the mere fact of differences in treatment. [*Teamsters v. United States*, 431 U.S. 324, 335 n.15.] [1]

Whether in any given case there is the "discriminatory motive" necessary to establish a "disparate treatment" violation is an issue of fact: was the employer in fact "motivated by discriminatory animus." *Burdine*, 450 U.S. at 257-259; *Furnco Construction Corp. v. Waters*, 438 U.S. 567, 576-580. If the employer in fact took the challenged action for discriminatory reasons, there is a violation of § 703(a)(1). If the employer in fact took the challenged action for nondiscriminatory reasons, then, even though the action may have a harmful effect on one

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[1] There is a second category of claims encompassed by Title VII—claims of "disparate impact"—in which discriminatory motive is not an element of the violation.

> Claims of disparate treatment may be distinguished from claims that stress "disparate impact." The latter involve employment practices that are facially neutral in their treatment of different groups but that in fact fall more harshly on one group than another and cannot be justified by business necessity . . . Proof of discriminatory motive, we have held, is not required under a disparate-impact theory. [*Teamsters*, *supra*, 431 U.S. at 336 n. 15].

Like the instant case, the discussion in this brief is confined to claims of disparate treatment.

or more members of a minority group, and even though the employer's reasons may be ones that others would not adopt, there is no violation of § 703(a)(1). *Ibid.* Thus, this Court's description in *Pullman-Standard v. Swint*, —— U.S. ——, 50 L.W. 4425, 4429-4430 (April 27, 1982), of the "discriminatory intent" requirement of § 703(h) of Title VII, we submit, applies equally to the "discriminatory intent" requirement of § 703(a)(1):

> [U]nder § 703(h) discriminatory intent is a finding of fact to be made by the trial court; it is not a question of law and not a mixed question of law and fact of the kind that in some cases may allow an appellate court to review the facts to see if they satisfy some legal concept of discriminatory intent. Discriminatory intent here means actual motive; it is not a legal presumption to be drawn from a factual showing of something less than actual motive. [Footnote omitted.]

2. This Court has written much about what it takes for a plaintiff to establish a "prima facie case" of disparate treatment under § 703(a)(1). But our point here is that if that concept is to have utility in the context of the way cases in the federal courts are actually tried, a "prima facie case" must be a case sufficient to survive a motion under Rule 41(b), F.R.Civ.P. *Cf. Burdine*, 450 U.S. at 254 and n.7. The issue addressed in *McDonnell Douglas* and *Burdine* is when has the plaintiff in a disparate treatment case shown enough to require the defendant to go forward or suffer judgment for the plaintiff. In practice, that issue arises in the context of a Rule 41(b) motion by the defendant.

In a Title VII case, the trial court, sitting without a jury, is the finder of fact. Under Rule 41(b), that court may at the close of the plaintiff's evidence "determine" the facts, including the resolution of credibility issues, in order to determine whether to make the defendant come forward or whether to render judgment against the plain-

tiff. To survive a Rule 41(b) motion, a plaintiff must convince the trial court that in the absence of any further evidence the record as it stands entitles plaintiff to judgment.[2] In a disparate treatment case, then, if at the close of the plaintiff's evidence the trial court has been persuaded that it is "more likely than not" that the defendant was motivated by a discriminatory animus, the plaintiff's case is not subject to dismissal under Rule 41(b). If that court has not been so persuaded, the plaintiffs' case is subject to dismissal:

> [A] Title VII plaintiff carries the initial burden of showing actions taken by the employer from which one can infer, if such actions remain unexplained, that it is more likely than not that such actions were "based on a discriminatory criterion illegal under the Act." [*Furnco Construction Corp.*, 438 U.S. at 576.]

3. Judged by that standard, on the facts as set forth by the court below the plaintiff in the instant case did not make out a prima facie case of disparate treatment. As described by the court of appeals, the plaintiff's evidence showed that he is black, that he applied for promotions to positions for which he possessed at least the minimal qualifications, and that in each instance the defendant promoted someone else from among the pool of applicants. The plaintiff's evidence did not show that he was more qualified

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[2] See 9 Wright & Miller, Federal Practice and Procedure § 2371, at 224-225 (1971) (footnotes omitted):

> The court is not to make any special inferences in the plaintiff's favor nor concern itself with whether plaintiff has made out a prima facie case. Instead it is to weigh the evidence, resolve any conflicts in it, and decide for itself where the preponderance lies.

See also, *e.g.*, 5 Moore's Federal Practice ¶¶ 41.13[3]-[4]; see *Benton v. Blair*, 228 F.2d 55, 58 (5th Cir. 1956); *Emerson Electric Co. v. Farmer*, 427 F.2d 1082, 1086 (5th Cir. 1970); *Woods v. North American Rockwell Corp.*, 480 F.2d 644, 645-646 (10th Cir. 1973).

than those who were actually promoted, or even as qualified. Thus, even if fully believed by the trial court, the plaintiff's evidence did not "eliminate[]" one of "the most common nondiscriminatory reasons for the plaintiff's rejection"[3]: a "relative lack of qualifications."[4] Nor did the plaintiff present evidence to show that the Postal Service was engaging in a pattern of discrimination in promotions—indeed he did not even show that the promotions he sought were given disproportionately to whites; and he did not show any other acts or statements of the defendants that might give rise to an inference of intentional race discrimination. On such evidence, it would have been clearly erroneous for the trial court to have found it "more likely than not" that the defendant committed acts of intentional race discrimination against the plaintiff. Yet the ruling of the court below that plaintiff proved a prima facie case is tantamount to just such a finding.

4. The court of appeals reached its result through a mechanical application of the factors set forth in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802, as criteria for determining when a plaintiff has made out a prima facie case of intentional discrimination:

> The complainant in a Title VII trial [may] carry the initial burden under the statute of establishing a prima facie case of racial discrimination * * * * by showing (i) that he belongs to a racial minority; (ii) that he applied and was qualified for a job for which the employer was seeking applicants; (iii) that, despite his qualifications, he was rejected; and (iv) that, after his rejection, the position remained open and the employer continued to seek applicants from persons of complainant's qualifications.

The Postal Service, in its petition, suggests that the error of the court below was in failing to recognize that

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[3] *Burdine*, 450 U.S. at 254.

[4] *Teamsters*, 431 U.S. at 358 n. 44.

the factual context of this case—"the promotion context where many applicants may be minimally qualified for a single vacancy"—requires a modification of the fourth factor quoted above. (Pet. 6-7, 10-12.) The Postal Service argues that in this context it is not sufficient for a plaintiff simply to prove that he applied for an open position for which he was minimally qualified and was rejected:

> In this case, respondent did not show—and the court of appeals on remand did not require that respondent show—that he was rejected under circumstances that give rise to an inference of discrimination. In other words, respondent neither showed, nor was required by the court of appeals to show, that he was as qualified or more qualified than those selected, and he produced no evidence of specific acts showing that the Postal Service had otherwise discriminated against him or anyone else. [Pet. at 11; footnote omitted.]

Modification of the fourth *McDonnell Douglas* factor in the manner suggested by the Postal Service might well suffice to improve the fact-finding process in cases with a fact pattern similar to that here (including cases where hiring is done from a pool of minimally qualified applicants). But, we respectfully submit, such a solution would not address the more fundamental problem illustrated by the decision below.

The *McDonnell Douglas* factors have created three untoward consequences: (a) decisions, such as the one in this case, finding a prima facie case in perceived obedience to *McDonnell Douglas* although on a common sense basis it is plain that the plaintiff has not shown that it is more likely than not that discrimination occurred; (b) decisions in which the lower courts, after expending their time and effort struggling with whether to apply those factors, have then made the determination that it is necessary to articulate and apply different criteria, responsive to the circumstances of the partic-

ular case, in order to enable the court to make a sound determination;[5] and (c) confusion and conflict in the lower courts as to the meaning of the individual factors.[6]

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[5] Conflicts have developed over whether particular fact situations call for the adaptation or abandonment of the *McDonnell Douglas* factors, and over whether they should be applied in their original form. *Compare Flowers v. Crouch-Walker*, 552 F.2d 1277, 1282 (7th Cir. 1977) *with Osborne v. Cleland*, 620 F.2d 195, 197-98 (8th Cir. 1980); *compare Pettit v. United States*, 488 F.2d 1026, 1033 (Ct. Cl. 1973) *with Hagans v. Andrus*, 25 FEP Cases 502, 505 (9th Cir. 1981); *compare Hochstadt v. Worcester Foundation for Experimental Biology*, 425 F.Supp. 318, 324 (D. Mass.), *aff'd*, 545 F.2d 222 (1st Cir. 1976) *with Miller v. Williams*, 590 F.2d 317, 320 (9th Cir. 1979); see also *Wright v. National Archives & Records Service*, 609 F.2d 702, 715 (4th Cir. 1979); *id.* at 720 (Butzner, J., dissenting); *Ruckel v. Essex International*, 14 FEP Cases 406 (N.D. Ind. 1976); *Capers v. Long Island R.R.*, 573 F.2d 1291 (S.D. N.Y.), *aff'd sub nom. Harris v. Long Island R.R.* (2d Cir. 1977). Even those courts that agree that the *McDonnell Douglas* factors must be adjusted to fit certain situations do not agree as to exactly how those factors should be adjusted, or when specific alterations should apply. *Compare Minor v. Lakeview Hospital*, 434 F.Supp. 633, 636 (E.D. Wis. 1977), *aff'd*, 582 F.2d 1284 (7th Cir. 1978), *and Hernandez v. Western Electric*, 23 FEP Cases 1244, 1249 (S.D. Tex 1978) *with Metcalf v. Omaha Steel Castings Co.*, 507 F.Supp. 679 (D. Neb. 1981). *See also Worthy v. United States Steel*, 616 F.2d 698, 700 (3d Cir. 1980); *Capers, supra*, 429 F.Supp. at 1365.

[6] There is considerable confusion over the meaning of the word "qualifications" as used in the second and fourth *McDonnell Douglas* factors.

Some courts have required only a showing of "minimum objective qualifications" at the prima facie stage, excluding evidence of comparative qualifications until the rebuttal stage. *See, e.g., Davis v. Weidner*, 596 F.2d 726, 730 (7th Cir. 1979); *Abrams v. Johnson*, 534 F.2d 1226, 1231 (6th Cir. 1976); *Sklenar v. Central Board of Education*, 497 F.Supp. 1154, 1160 (E.D. Mich. 1980). In promotion cases and pool hiring situations, however, a number of courts have required a plaintiff to make a prima facie showing that he or she is at least as qualified as the successful applicant(s). *See, e.g., Pinckney v. County of Northampton*, 512 F.Supp. 989, 998 (E.D. Pa. 1981), *appeal pending*, No. 81-1887 (3d Cir.); *Colston v. Pingree*, 498 F.Supp. 327, 336 (N.D. Fla. 1980); *Canty v. Olivarez*, 452 F.Supp. 762, 770 (N.D. Ga. 1978); *Briscoe v. Director, Admin. Office of the U.S. Courts*, 20 FEP Cases 516, 519 (D. D.C. 1977);

5. The fact pattern presented here is not aberrational in its failure to fit neatly into the *McDonnell Douglas* four-factor mode of analysis. Rather, it reflects a more

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Frink v. U.S. Navy, 16 FEP Cases 67, 69 n. 2 (E.D. Pa. 1977); *Nakagawa v. Reed*, 20 FEP Cases 481, 485 (D. D.C. 1977); *Oliver v. Moberly Missouri Sch. Dist.*, 427 F.Supp. 82, 86 (E.D. Mo. 1977). Other courts have adhered to a "minimum objective qualifications" approach in promotion cases, as the court below did in the instant case. *See Davis v. Califano*, 613 F.2d 957, 964-65 (D.C. Cir. 1979); *Davis v. Weidner*, *supra*; *Abrams*, *supra*; *Sklenar*, *supra*.

There is a similar disagreement over how to apply the qualifications factor when the plaintiff is a white person alleging racial discrimination. *Compare Mosley v. United States*, 425 F.Supp. 50, 58 (N.D. Cal. 1977) (requiring plaintiff to show he was best qualified for job) *with Daye v. Harris*, 655 F.2d 258, 262 n. 11 (D.C. Cir. 1981) (requiring minimum qualifications).

Even when courts agree that evidence of comparative qualifications is necessary, they may disagree on whether it is the second or the fourth *McDonnell Douglas* factor that requires such evidence. *Compare Pinckney*, *supra*, 512 F.Supp. at 989 *with Briscoe*, *supra*, 20 FEP Cases at 519.

In discharge cases, some courts have apparently lowered the level of "qualifications" necessary to establish a prima facie case. *Compare Powell v. Syracuse University*, 580 F.2d 1150, 1155 (2d Cir. 1978), *cert. denied*, 439 U.S. 984 (1979) *with Lieberman v. Gant*, 630 F.2d 60, 64 (2d Cir. 1980). *See also Flowers v. Crouch-Walker*, 552 F.2d 1277, 1283 (7th Cir. 1977). *But cf. Henry v. Ford Motor*, 553 F.2d 46, 48 (8th Cir. 1977); *Morales v. Dain, Kalman & Quail*, 467 F.Supp. 1031, 1039 (D. Minn. 1979).

Another area of confusion surrounding the application of the "qualifications" factor is whether only objective qualifications are to be considered or whether the employer's subjective requirements should be taken into account. *Compare Crawford v. Western Electric*, 614 F.2d 1300, 1317 (5th Cir. 1980) (employer's rating system ignored because too subjective) *with Frink v. United States Navy*, 16 FEP Cases 67, 69 (E.D. Pa. 1977) (subjectivity inevitable in selecting among applicants for "sophisticated" jobs).

Generally, courts seems to be more willing to tolerate subjectivity in the evaluation of applicants in professional, supervisory or highly skilled jobs, although nothing in Title VII forbids employers from considering subjective factors with respect to *all* jobs, and as explained in text (*infra* at 11) they normally do so. *See, e.g.*,

general phenomenon: there are a wide variety of employment contexts in which employment decisions are made, and a virtually infinite variety of fact patterns out of which those decisions emerge; no particular prescribed set of factors—whether those enunciated in *McDonnell Douglas*, or others that could be devised—will reliably assist courts faced with this range of cases in determining whether it is "more likely than not" that a decision was made with a discriminatory motive.

Frausto v. Legal Aid Society of San Diego, 563 F.2d 1324, 1328 (9th Cir. 1977); *Oliver v. Moberly Missouri Sch. Dist.*, 427 F.Supp. 82, 87 (E.D. Mo. 1977); *Canty v. Olivarez*, 452 F.Supp. 762, 770 (N.D. Ga. 1978). *But see Davis v. Califano*, 613 F.2d 957, 964 (D.C. Cir. 1979).

When a claim for denial of professional employment or tenure is involved, a number of courts have applied the "qualifications" factors in such a way as to allow the employer much greater room for discretion. In one case, a Mexican-American attorney had been denied employment even though some of his objective qualifications were superior to those of the successful applicants. Nevertheless, the court of appeals upheld the district court's granting of a 41(b) motion at the close of the plaintiff's case, observing that the plaintiff did not appear as reliable or as easy to get along with as the other applicants. *Frausto v. Legal Aid Society of San Diego, Inc.*, 563 F.2d 1324, 1328 (9th Cir. 1977). *See also Lieberman v. Gant*, 630 F.2d 60, 64, 68 (2d Cir. 1980) (tenure); *Frink v. United States Navy*, 16 FEP Cases 67, 70 (E.D. Pa. 1977) (architect); *Oliver v. Moberly Missouri Sch. Dist.*, 427 F.Supp. 82, 87 (E.D. Mo. 1977) (teachers).

Other courts, however, have adhered to the "minimum objective qualifications" approach in the context of professional employment. In one case, a woman chemist challenged her employer's failure to promote her to the position of "independent investigator." The position was usually held by highly trained Ph.D.s or physicians, but the only formal job requirements were the subjective attributes of innovation and creativity. The D.C. Circuit held that there were no "minimum objective qualifications" for the job at all. *Davis v. Califano*, 613 F.2d 957, 964-65 (D.C. Cir. 1979). *See also Sklenar v. Central Bd. of Educ.*, 497 F.Supp. 1154, 1160 (E.D. Mich. 1980); *Banerjee v. Board of Trustees of Smith College*, 495 F.Supp. 1148, 1155 (D. Mass. 1980).

The classic case of intentional discrimination is built on evidence of overtly discriminatory statements or policies by the defendant or his agents or of a history or pattern of discrimination by the defendant as revealed by statistical or anecdotal evidence showing that otherwise comparable people are treated differently by the defendant because of their race, color, sex, or national origin. The *McDonnell Douglas* factors come into play as *the* means to establish a prima facie case only when the plaintiff, despite access to the pre-trial discovery process, has not been able to find any such evidence. Thus, the *McDonnell Douglas* four-factor analysis posits a situation where, with no other evidence of discrimination, evidence of the applicant's qualifications, of the requirements for the job he was seeking, and of his rejection are a sufficient basis to persuade a factfinder that the defendant has engaged in intentional discrimination.

Such evidence does, we believe, lead to such an inference in the following situation: the employer's selection criteria for a job are rigid and mechanical; if there is an opening, once those criteria are met, selection is automatic; the plaintiff meets the criteria, applied for the job, there was an opening, but he was rejected. But that type of selection process is rare in our economy. As this case shows, employers often hire and promote from a pool of applicants all of whom meet a set of "objective" qualifications and who are judged by the employer on a comparative basis. And, apart from such competitive processes, even for the most menial jobs, it is common for employers to introduce discretionary or judgmental factors into the hiring process. Applicants are screened for work-related attitudes—such as diligence and courteousness—through interviews, prior job histories, and references. And, for a vast array of jobs in our society, job skills and qualifications are to a significant degree subjective and the evaluation of an individual's qualifications may differ, for legitimate reasons, depending on the evaluator.

Once subjective or discretionary elements enter the employer's selection process, the four-factor analysis cannot, unless it somehow accounts for those elements, serve its purpose—to determine whether "it is more likely than not" that the defendant committed an act of intentional discrimination. For example, a female lawyer applies to a law firm for an associate position that the firm is seeking to fill, and is rejected. Obviously, there are many possible explanations for her rejection other than sex discrimination. Indeed, even if she proved that she had the same general academic qualifications and experience as others who had been hired by the firm, sex discrimination would still not be the most likely inference. It is common experience in the legal profession for applicants of high objective qualifications to be rejected for jobs because there are other applicants with higher qualifications or because of legitimate subjective reasons, perhaps gleaned from interviews, references, writing samples and the like.[7] And the "qualifications" requirement of the *McDonnell Douglas* factors is not capable of addressing in a practical fashion this situation. The applicant is "qualified" for a job only if she is "qualified" in the subjective judgment of the law firm, taking into account the multiplicity of factors that go into that judgment—*e.g.*, writing style, ability to work with others in the firm, ability to get along with clients, interest, and general attitudes toward work. Obviously, discrimination on the basis of sex cannot legally be part of that judgment, but the single fact that the applicant was rejected on the basis of subjective and judgmental factors does not make it "more likely than not" that sex discrimination was involved. If the law assumed otherwise, plaintiffs would be able to establish a prima facie case any time an employment decision is based on such subjective factors.

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[7] See *Krausto v. Legal Aid Society of San Diego*, 563 F.2d 1324 (9th Cir. 1977).

What is true of filling a legal position is also true of filling other professional and semi-professional positions, decisions whether to grant academic tenure, and the like. It is also generally true of filling skilled trade positions; as anyone knows who has had the smallest experience with a construction job, painters, bricklayers, electricians, and members of other crafts may meet the objective qualifications that go into being a journeyman and still, because of the range of skill, experience, and judgment called for in their work, be far from equal to others within their own craft. Similarly, sales, secretarial, and even janitorial positions are often filled on the basis of such legitimate subjective considerations as an applicant's dependability, as well as on objective factors.

In sum, except in the rare case where an employer's hiring decisions are "automatic" once measurable objective criteria have been met, proof of the *McDonnell Douglas* factors, standing alone, does not make it "more likely than not" that a rejection was discriminatorily motivated. It is part of the regular course of our economy, in both the public and private sectors, for men and women of all races, creeds, and nationalities to be rejected, for a multitude of altogether legitimate reasons, in their quest for a new job or for a promotion. Under traditional legal principles, in most cases proof of the four factors alone should not be sufficient to withstand a Rule 41(b) motion at the close of the plaintiff's case: the plaintiff has not negated the likeliest inference, *viz.* that the employer acted on the basis of the legitimate criteria that generally inform its employment decisions.

6. The foregoing analysis does not put on plaintiffs in Title VII cases the burden of having to negate the employer's innocent explanations for his conduct before the plaintiff knows what those explanations are.

First, it should be recalled that a plaintiff's only burden is to prove it "more likely than not" that he was the

victim of intentional discrimination. Wherever there is evidence of discriminatory motivation apart from the mere fact of the plaintiff's rejection, the plaintiff's prima facie case will likely not depend upon negating the employer's proffered reasons.

Second, even in the case where the plaintiff seeks to prove his case by inference from his rejection, his burden would not be to negate unknown employer explanations or to negate every conceivable explanation. The federal court trial process is built on liberal discovery rules that entitle every Title VII plaintiff to ascertain in advance of trial the employer's asserted reasons for the rejection, and to obtain all arguably relevant evidence that bears upon the honesty of the employer's explanation. See Rules 26-37, F.R. Civ. P., *Hickman v. Taylor*, 329 U.S. 495, 501, 507. Additionally, by means of pre-trial statements and a pre-trial order, the employer's proffered explanation will have been defined as an issue for trial. And, of course, the plaintiff is entitled to call employer representatives as adverse witnesses at trial, and to cross-examine them as part of the plaintiff's case.

Third, as the point just made indicates, the three stages of proof envisioned by *McDonnell Douglas* are rarely neat in practice. In trials, as in life, the four factors rarely exist in a vacuum. During the plaintiff's direct case, cross-examination of the plaintiff and examination and cross-examination of the plaintiff's witnesses both friendly and adverse ordinarily inject additional evidence that weighs on the scales of whether it is "more likely than not" that the decision was discriminatorily motivated. For example, evidence may be elicited during the plaintiff's case that the defendant checked with the plaintiff's prior employer and discovered that the plaintiff had a poor attendance record; that the person or persons making the hiring or promotion decision were of the same minority group as the plaintiff; or, that the employer had hired a significant number of others of the plaintiff's minority group to fill the same position as the

plaintiff sought. The defendant's explanation may therefore in any event creep in as part of the plaintiff's case.[8]

Thus, if a plaintiff uses the full range of options the Federal Rules make available, he should be as well-positioned to prove that the employer's reasons are pretextual as part of his prima facie case as he would be if the burden were postponed to the rebuttal stage. *Cf. Burdine*, 450 U.S. at 258. Indeed, proof that an employer's explanation is pretextual is one method to establish an inference of discrimination, for proof that the proffered reasons are false is probative that the real reason is the very one the employer is disclaiming. See *Folkins v. NLRB*, 500 F.2d 52 (9th Cir. 1974); *Krajewski v. NLRB*, 413 F.2d 673 (1st Cir. 1969); *NLRB v. Camco, Inc.*, 369 F.2d 125 (5th Cir. 1966).[9]

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[8] If evidence adverse to the plaintiff's prima facie case has been introduced during the prima facie stage itself, some courts have been willing to grant Rule 41(b) motions before the trial reaches the "rebuttal" and "pretext" stages. One court has remarked that *McDonnell Douglas* does not mandate a "judicial minuet." *Sime v. Trustees of California State University and Colleges*, 526 F.2d 1112, 1114 (9th Cir. 1975). *See also Flowers v. Crouch-Walker*, 552 F.2d 1277 (7th Cir. 1977); *Frausto v. Legal Aid Society of San Diego, Inc.*, 563 F.2d 1324, 1328 (9th Cir. 1977); *Olson v. Philco-Ford*, 531 F.2d 474 (10th Cir. 1976); *Sanders v. Sherwin-Williams*, 495 F.Supp. 571, 574, 581 (E.D. Mich. 1980).

However, when a trial court has entered a judgment for the defendant without adhering to the three-step procedure spelled out in *McDonnell Douglas*, some appellate courts have remanded the case—not to take additional evidence, but simply to reexamine the existing evidence by means of the three-step analysis. *Daye v. Harris*, 655 F.2d 258, 263 (D.C. Cir. 1981); *Blizard v. Fielding*, 572 F.2d 13, 15 (1st Cir. 1978). *But see Worthy v. United States Steel*, 616 F.2d 698, 701 (3d Cir. 1980); *Davis v. Weidner*, 596 F.2d 726, 730 n. 4 (7th Cir. 1979); *Adams v. Reed*, 16 FEP Cases 1040, 1042 n. 6 (5th Cir. 1978); *Henry v. Ford Motor Co.*, 553 F.2d 46, 48 (8th Cir. 1977); *Mosby v. Webster College*, 563 F.2d 901, 903 (8th Cir. 1977).

[9] In those cases where the plaintiff lacks any extrinsic evidence of discrimination and his case therefore is ultimately dependent on negating the employer's proffered explanation, it makes sense

7. The foregoing indicates that the *McDonnell Douglas* four-factor approach to the establishment of a prima facie case may create more problems than it solves. It leads inevitably either to innumerable exceptions and modifications, or else to unsound results such as that here. Of equal importance, given the scarcity of judicial resources and the interest of litigants in expeditious resolution of their cases, the *McDonnell Douglas* factors have caused an extended debate—and not infrequent conflicts—in the lower coutrs over just what particular words in one or another of the factors "mean." These debates are wholly diversionary, for the focus of the court's attention is not on the *real* question—whether the plaintiff has shown that it is "more likely than not" that the employer was discriminatorily motivated—but rather on the entirely *artificial* question of what this Court intended in its delineation of the factors.

We respectfully suggest that the cause of reliable fact-finding would be best served were the Court to remove all mediating constructs from the factual analysis in disparate treatment cases and simply to mandate a straightforward inquiry into the question of

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from the point of view of the use of court time, not to speak of more fundamental substantive reasons, to find out whether the plaintiff has any case the first time around, rather than having to wait until the rebuttal stage to see whether there is any proof of intentional discrimination. For, regardless of the weakness of the plaintiff's case, the defendant's case is liable to be time-consuming. As this Court recognized in *Burdine*, 450 U.S. at 258, even though not required to do so "the defendant . . . retains an incentive to persuade the trier of fact that the employment decision was lawful . . . [and thus] normally will attempt to prove the factual basis for its explanation." A number of courts have noted the potential of the *McDonnell Douglas* analysis unnecessarily to protract litigation of disparate treatment claims. *Lieberman v. Gant*, 630 F.2d 60, 62 n. 1 (2d Cir. 1980); *Davis v. Califano*, 613 F.2d 957, 968 (D.C. Cir. 1979) (MacKinnon, J., dissenting); *Watson v. Magee Women's Hospital*, 472 F. Supp. 325, 330 (W.D. Pa. 1979); *EEOC v. Tufts Institution of Higher Learning*, 421 F.Supp. 152, 158 (D. Mass. 1975).

discriminatory intent, based on all relevant evidence in whatever form it may come. That is the approach the Court has taken with respect to proof of discriminatory intent under the Fourteenth Amendment.

As explained in *Arlington Heights v. Metropolitan Housing Corp.*, 429 U.S. 252, 266: "Determining whether invidious discriminatory purpose was a motivating factor demands a sensitive inquiry into such circumstantial and direct evidence of intent as may be available." To be sure, the Court identified a number of evidentiary consideartions that "may shed some light on the decision-maker's purposes." *Id.*, at 266-268. But *Arlington Heights* did not construct a matrix against which the evidence in each case is to be assessed. Rather, the Court stated: "The foregoing summary identifies, without purporting to be exhaustive, subjects of proper inquiry in determining whether racially discriminatory intent existed." *Id.*, at 268.

The Court has followed that same approach with respect to the determination of discriminatory intent under § 703(h) of Title VII. *Pullman-Standard*, quoted *supra* at 4; see also *id.*, at 50 L.W. at 4427, n.8.

Indeed, the approach of *Arlington Heights* and *Pullman-Standard* is the one that this Court has deemed appropriate generally when the factual inquiry relates to an actor's state of mind. In *Commissioner v. Duberstein*, 363 U.S. 278, the Court, in rejecting the Government's request that it declare two "factors" to be conclusive on the factual question of donative intent, explained:

> The conclusion whether a transfer amounts to a "gift" is one that must be reached on consideration of *all* the factors.
>
> . . . [W]hile the principles urged by the Government may, in nonabsolute form as crystallizations of experience, prove persuasive to the triers of facts in a particular case, neither they, nor any more detailed

> statement than has been made, can be laid down as a matter of law. [363 U.S. at 288-289].

It is true in disparate treatment cases, just as in *Commissioner v. Duberstein*, that no factor "is a shibboleth". *Id.* at 287.

CONCLUSION

For the reasons set forth above, this Court should reconsider the requirements for proof of a prima facie case of disparate treatment under Title VII and adopt the approach of *Arlington Heights* to the analogous question of proving discriminatory intent under the Fourteenth Amendment.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

UNITED STATES POSTAL SERVICE
BOARD OF GOVERNORS,
Petitioner,

v.

LOUIS H. AIKENS,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia

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TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
INTEREST OF THE AMICUS CURIAE	1
STATEMENT OF THE CASE	2
SUMMARY OF ARGUMENT	4
ARGUMENT	6
TO ESTABLISH A PRIMA FACIE CASE OF DISPARATE TREATMENT, A PLAINTIFF MUST SHOW THAT HE IS AT LEAST AS QUALIFIED AS THE PERSON(S) SELECTED BY THE EMPLOYER FOR AVAILABLE POSITIONS	6

TABLE OF AUTHORITIES

Cases: Page

Causey v. Ford Motor Co., 516 F.2d 867 (8th Cir. 1975) 10
City of Los Angeles v. Manhart, 435 U.S. 702 (1978) 9
East Texas Motor Freight v. Rodriguez, 431 U.S. 395 (1977) 2
EEOC v. Associated Dry Goods Corp., 101 Sup. Ct. 817 (1981) 13
Furnco Construction Co. v. Waters, 438 U.S. 567 (1978) 2, 5, 7, 12
Griggs v. Duke Power Co., 401 U.S. 424 (1971) 4, 12
Intl. Bro. of Teamsters v. United States, 431 U.S. 324 (1977) 2, 7, 8, 9
McDonnell Douglas v. Green, 411 U.S. 792 (1973) .. 3, 6, 7, 8, 9, 10, 11, 14, 15, 16
Olson v. Philco-Ford, 531 F.2d 474 (10th Cir. 1976) 13
Pinckney v. Cty. of Northhampton, —— F. Supp. ——, 27 FEP Cases 528 (E.D. Pa. 1981), *appeal pending*, No. 81-1887 (3d Cir.) 16
Shack v. Southworth, 521 F.2d 51 (6th Cir. 1975) .. 10
State of Connecticut v. Teal (No. 80-2147) (1981) .. 2
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Texas Dept. of Community Affairs v. Burdine, 101 Sup. Ct. 1089 (1981) 2, 3, 4, 6, 7, 8, 9, 11, 16
Ward v. Westland Plastics, Inc., —— F.2d ——, 23 FEP Cases 128 (9th Cir. 1980) 10
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Statute:

Title VII, Civil Rights Act of 1964, as amended, 42 U.S.C. §§ 2000e ..... *passim*

Miscellaneous:

110 Cong. Rec. 7247 (1963) 12
McCormick, Evidence (1972) 9

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

No. 81-1044

UNITED STATES POSTAL SERVICE
BOARD OF GOVERNORS,
Petitioner,

v.

LOUIS H. AIKENS,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia

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BRIEF AMICUS CURIAE FOR THE EQUAL EMPLOYMENT ADVISORY COUNCIL IN SUPPORT OF THE PETITIONER

The Equal Employment Advisory Council (EEAC) with the written consent of the parties,[1] respectfully submits this brief as Amicus Curiae in support of the Petitioner.

INTEREST OF THE AMICUS CURIAE

EEAC is a voluntary nonprofit association organized to promote the common interest of employers and the general public in sound government policies, procedures and requirements pertaining to nondiscriminatory employment practices. Its membership

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[1] Their consents have been filed with the Clerk of the Court.

comprises a broad segment of the employer community in the United States, including both individual employers and trade and industry associations. Its governing body is a Board of Directors composed primarily of experts and specialists in the field of equal employment opportunity whose combined experience gives the Council a unique depth of understanding of the practical and legal considerations relevant to the proper interpretation and application of EEO policies and requirements.

Substantially, all of EEAC's members, or their constituents, are subject to the provisions of Title VII of the Civil Rights Act of 1964, as amended (42 U.S.C. §§ 2000e *et seq.*) (Title VII). As such, EEAC's members have a direct interest in the issue presented for the Court's consideration; that is, whether in establishing a prima facie case of disparate treatment a plaintiff must demonstrate that he was equally or better qualified than the individual(s) selected.[2]

STATEMENT OF THE CASE

The plaintiff filed an individual Title VII suit alleging race discrimination by the U.S. Postal Service in promotions and details to several managerial positions. Following a full trial on the merits, the district court found that the plaintiff had failed to es-

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[2] Because of its interest in issues involving the standard of proof in Title VII cases, EEAC has filed briefs amicus curiae in this Court in *Intl. Bro. of Teamsters v. United States*, 431 U.S. 324 (1977); *East Texas Motor Freight v. Rodriguez*, 431 U.S. 395 (1977); *Furnco Construction Co. v. Waters*, 438 U.S. 567 (1978); *Texas Dept. of Community Affairs v. Burdine*, 101 Sup. Ct. 1089 (1981); and *State of Connecticut v. Teal*, (No. 80-2147).

tablish a prima facie case of discrimination in part because he had failed to show that he was as qualified or more qualified than other persons who were promoted or detailed. The District of Columbia Court of Appeals reversed. It concluded that the plaintiff was qualified, *i.e.*, had shown minimum qualifications for the position in question and, accordingly, that the plaintiff had established a prima facie case of race discrimination consistent with the standards set forth in *McDonnell Douglas v. Green*, 411 U.S. 792, 802 (1973). It found no authority to support the trial court's conclusion that under *McDonnell Douglas*, a plaintiff is required to prove that he was "as qualified or more qualified" than those selected.

Judge Wilkey dissented, emphasizing that this Court has held that an assessment of relative as well as absolute lack of qualifications is relevant to the *McDonnell Douglas* test (Pet. for Cert. 35a) and that, in any event, the standards for a prima facie case of disparate treatment are to be applied flexibly (Pet. for Cert. 31a). He stressed, moreover, that the appellate court's preference for minimum qualifications over a comparative evaluation of qualifications bore no relationship to how selection decisions are actually made (Pet. for Cert. 33a), and would have the effect of fostering litigation (Pet. for Cert. 38a).

Subsequently, this Court granted the Postal Services' certiorari petition, vacated the judgment, and remanded the case to the D.C. Circuit for further consideration in light of the Court's decision in *Texas Department of Community Affairs v. Burdine*, 101 Sup. Ct. 1089 (1981). On remand, the court of appeals continued to adhere to its view that establishment of a prima facie case does not require proof that the plaintiff was "as qualified or more quali-

fied" than persons hired or promoted. But it modified its earlier decision by stating:

> A plaintiff who demonstrates that he possesses the absolute minimum qualifications for a job, therefore, does not necessarily make out a prima facie case; if the employer has indicated that certain additional qualifications are necessary or preferred, the plaintiff must demonstrate that he has those qualifications as well.

From this opinion, the U.S. Postal Service filed the instant petition for a writ of certiorari which the Court granted.

SUMMARY OF ARGUMENT

In order to establish a prima facie case of illegal discrimination in the denial of a promotion, a plaintiff must show more than that he was minimally qualified for a position that went to a candidate of another race. Rather, he must show that he was as qualified or more qualified than the person(s) selected based on the employer's selection criteria. Such a standard is consistent with the precedent of this Court holding that the purpose of a prima facie case is to establish an inference of discrimination or a rebuttable presumption. *Texas Dept. of Community Affairs v. Burdine*, 101 Sup. Ct. 1089 (1981). No such presumption is created when a plaintiff merely demonstrates minimum qualifications.

A minimum qualifications standard is inconsistent with the purpose of Title VII to encourage hiring and promotion on the basis of job qualifications, rather than on the basis of race, sex, or ethnic classifications. *Griggs v. Duke Power Co.*, 401 U.S. 424, 435 (1971). Title VII does not demand that employers adopt a "best" hiring procedure that would

permit it "to at least consider . . . the most minority employees." *Furnco Construction Corp. v. Waters*, 438 U.S. 567, 578 (1978). Indeed, a unanimous Court in *Burdine* rejected the view that would require "the employer to hire the minority or female applicant whenever that person's objective qualifications were equal to those of a white male applicant." 101 Sup. Ct. at 1097. Rather, the Court held that an "employer has discretion to choose among equally qualified candidates" and Title VII "does not require an employer to restructure [its] employment practices to maximize the number of minorities and women hired." *Id.* A minimum qualifications standard for prima facie cases would serve to undercut these principles, because it would facilitate suits by minimally qualified applicants against employers who select employees based on superior qualifications.

The modified standard suggested by the court of appeals upon remand, which would require plaintiffs to show they also possessed any additional qualifications the employer has identified as "necessary or preferred," in no way overcomes the deficiencies in the court's original approach. It would still amount, in application, to a minimum qualification standard and fails to recognize the determinative importance of *relative* qualifications in making selections from among groups of applicants. Accordingly, the practical objections Judge Wilkey raised in dissenting from the court's original decision are equally valid with respect to its modified, post-remand approach. That is, since even a marginally qualified minority employee denied a promotion in favor of a superior nonminority employee would have an automatic prima facie case of discrimination, employers would be discouraged from selecting the superior candidate unless they had "sufficient resources of time and money to

rebut the prima facie case in extended litigation." Pet. for Cert. 38a. As Judge Wilkey observed: "To impose [the] added expense of making an affirmative defense on a defendant, who has not even been shown more likely than not to have discriminated, is neither fair nor consistent with usual trial procedure." *Id.*

ARGUMENT

TO ESTABLISH A PRIMA FACIE CASE OF DISPARATE TREATMENT, A PLAINTIFF MUST SHOW THAT HE IS AT LEAST AS QUALIFIED AS THE PERSON(S) SELECTED BY THE EMPLOYER FOR AVAILABLE POSITIONS.

In a series of decisions beginning with *McDonnell Douglas v. Green*, 411 U.S. 792 (1973) and continuing through *Texas Department of Community Affairs v. Burdine*, 101 Sup. Ct. 1089 (1981), this Court has set forth the standards for demonstrating a prima facie case of disparate treatment. *McDonnell Douglas* established the basic model for such proof; namely, the plaintiff must prove by a preponderance of the evidence:

> (i) that he belongs to a racial minority; (ii) that he applied and was qualified for a job for which the employer was seeking applicants; (iii) that, despite his qualifications, he was rejected; and (iv) that, after his rejection the position remained open and the employer continued to seek applicants from persons of complainant's qualifications.

411 U.S. 802.[3] The Court has recognized that varying factual circumstances may require flexible appli-

[3] Once the plaintiff has proved a prima facie case of intentional discrimination, a burden of production shifts to the employer to articulate a legitimate, nondiscriminatory rea-

cation of these standards (*id.* at 802 n. 13) but it has also stressed that:

> [T]he *McDonnell Douglas* formula . . . does demand that the alleged discriminatee demonstrate at least that his rejection did not result from the two most common legitimate reasons on which an employer might rely to reject a job applicant: an absolute or *relative lack of qualifications* or the absence of a vacancy in the job sought. Elimination of these reasons for the refusal to hire is sufficient, absent other explanation, to create an inference that the decision was a discriminatory one.

Intl. Bro. of Teamsters v. United States, 431 U.S. 324, 358 n. 44 (1977) (emphasis added).

The *McDonnell Douglas* formula for establishing a prima facie case is designed to show through circumstantial or indirect proof that the employer has intentionally discriminated against the individual plaintiff. Although a prima facie case does not conclusively demonstrate that the employer discriminated, it creates an inference or probability that such discrimination may have occurred. As the Court explained in *Furnco*:

> A prima facie case under *McDonnell Douglas* raises an inference of discrimination only because we presume these acts, if otherwise unexplained, are more likely than not based on the consideration of impermissible factors. . . . And

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son for the selection decision. *Burdine*, 101 Sup. Ct. at 1094. The burden of persuasion, however, remains at all times with the plaintiff. After the defendant has met its burden of production, the burden reverts to the plaintiff to show that the defendant's reason is a pretext for discrimination.

> we are willing to presume this largely because we know from our experience that more often than not people do not act in a totally arbitrary manner, without any underlying reasons, especially in a business setting.

438 U.S. at 577.

Establishment of a prima facie case creates a rebuttable presumption in a Title VII disparate treatment case that an employer has unlawfully discriminated against the employee or applicant. *Burdine*, 101 Sup. Ct. at 1094 & n. 7. As discussed below, when a plaintiff pleads minimum qualifications to prove a prima facie case, no inference of discrimination can logically be drawn. There is simply no basis in logic or experience to conclude that whenever an employer passes over a minimally qualified minority candidate for a position for which there were other applicants, it is "more likely than not" that the employer was motivated by discrimination.

Under *McDonnell Douglas*, the fact of discrimination at the prima facie case stage is inferred from the existence of a vacancy and an assessment of the plaintiff's "relative" qualifications. *Teamsters*, 431 U.S. at 358 n. 44. A judicial determination that a Title VII plaintiff has "minimum qualifications," however, says nothing about the probability or likelihood that the employer's actions were racially discriminatory. The adverse economic consequences of an unproductive workforce make it essential that employers not be presumed to have discriminated when they select the most qualified candidates available. Because it is unlikely that an employer will select a person with minimal qualifications over more qualified candidates, there can be no inference of discrimi-

nation unless the plaintiff shows that he is as qualified or more qualified than other available applicants. *See* McCormick, Evidence § 337 at 787 ("The risk of failure of proof may be placed upon the party who contends that the more unusual event has occurred") (footnote omitted).

Furthermore, the Court instructed in *Burdine* that "*McDonnell Douglas* teaches that it is the plaintiff's task to demonstrate that similarly situated employees were not treated equally." 101 Sup. Ct. at 1096. That is, the evidence must show that the plaintiff was treated in a manner which "but for [his race] would have been different." *City of Los Angeles v. Manhart*, 435 U.S. 702, 711 (1978). As a threshold matter, therefore, it is the plaintiff's burden to show that he was as qualified or more qualified than other competing candidates, because he cannot otherwise be considered "similarly situated" in light of the manifest importance of relative qualifications to selection decisions. An examination of the *McDonnell Douglas* model of proof and the precedent of this Court interpreting the purposes of Title VII reinforce this conclusion.

As stated above, the Court in *Teamsters* made clear that the *McDonnell Douglas* formula was designed to address the plaintiff's relative qualifications as well as any absolute lack of qualifications before the burden of production shifts to the defendant. Thus, the Court has treated the question of the plaintiff's relative qualifications separately from other legitimate reasons an employer may have for not selecting an individual which are proffered after a prima facie case has been established. Unlike other reasons for

nonselection such as disruptive influence,[4] attitude,[5] and business necessity,[6] which an employer may articulate at the second stage to rebut a prima facie case, the plaintiff's relative qualifications are resolved at the prima facie stage. Indeed, three of the four elements of proof for a prima facie case are tied to the plaintiff's qualifications for selection. More particularly, the third and fourth prongs of the *McDonnell Douglas* test—*i.e.*, rejection despite qualifications and an employer's continued search for a candidate with those qualifications—clearly relate to the issue of the plaintiff's relative qualifications in terms of the reasons for his rejection and the plaintiff's qualifications relative to other applicants and the person(s) subsequently hired or promoted.

Although the modified standard adopted by the court of appeals upon remand from the Court provides some recognition that more than a demonstration of absolute minimum qualifications may be required to establish a prima facie case if the employer has identified other selection criteria (Pet. for Cert. 6a), the standard is too vague to afford any real, practical guidance to trial courts in determining whether a prima facie case has been established, or to employers in determining how to make selection decisions that will not be presumed discriminatory. While the amended standard seems to add some flexibility to the court's original approach, the change is largely illusory. To the extent it requires the

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[4] *Causey v. Ford Motor Co.*, 516 F.2d 867, 869 (8th Cir. 1975).

[5] *Shack v. Southworth*, 521 F.2d 51, 55 (6th Cir. 1975).

[6] *Ward v. Westland Plastics, Inc.*, —— F.2d ——, 23 FEP Cases 128 (9th Cir. 1980).

plaintiff to show he possesses any additional qualifications the employer has indicated are "necessary," it merely restates the minimal qualifications test. To the extent it requires a showing that the plaintiff possesses additional qualifications the employer has indicated are "preferred," the court's modified approach still does not appear to recognize that qualifications can be possessed in varying degrees, and that absent a showing that the plaintiff had *as much* of the preferred skill, experience or other qualification as the candidate selected, the employer cannot logically be presumed to have based its selection on impermissible grounds.

The appellate court's failure to require a plaintiff to show that he was as qualified or more qualified than the selected individual(s) harbors the same substantive error that was of concern to the Court in *Burdine*. In that case, a unanimous Court rejected the position of the court of appeals that a defendant employer " 'must prove that those he hired . . . were somehow *better* qualified than was the plaintiff . . .' ", 101 S. Ct. at 1095, and that the employer be required "to show that the plaintiff's objective qualifications were inferior to those of the person selected." *Id.* at 1096. Rather, the Court held that the employer is not required to prefer minorities or women over equally qualified white males. *Id.* at 1096-97. It stated that:

> "The broad, overriding interest, shared by employer, employee, and consumer, is efficient and trustworthy workmanship assured through fair and . . . neutral employment and personnel decisions." *McDonnell Douglas, supra*, at 801, 93 S.Ct., at 1823. Title VII, however, does not demand that an employer given preferential treat-

> ment to minorities or women. 42 U.S.C. § 2000e-2(j). See *Steelworkers v. Weber*, 443 U.S. 193, 205-206, 99 S.Ct. 2721, 2728-2729, 61 L. Ed.2d 480 (1979). The statute was not intended to diminish traditional management prerogatives." *Id.*, at 207, 99 S.Ct., at 2729. It does not require the employer to restructure his employment practices to maximize the number of minorities and women hired. *Furnco Construction Co. v. Waters*, 438 U.S., at 577-578, 98 S.Ct., at 2949-2950. . . .

Id. at 1096-97. The minimum qualifications standard, however, even as it relates to all identifiable selection criteria is at odds with these principles.

Title VII "expressly protects the employer's right to insist that any prospective applicant, Negro or white, must meet the applicable job qualifications. Indeed, the very purpose of Title VII is to promote hiring on the basis of job qualifications, rather than on the basis of race or color." *Griggs v. Duke Power Co.*, 401 U.S. 424, 435 (1971) (emphasis in original) *quoting from* 110 Cong. Rec. 7247. A minimum qualifications standard for a prima facie case is tantamount to requiring an employer to restructure its employment practices and to adopt the "best" selection procedure that would permit it to consider the most minority employees. Title VII does not require such a result. *Furnco*, 438 U.S. at 578. But under the holding of the court below, to do otherwise puts virtually every employer at risk of lawsuit by any minimally qualified applicant because such applicants would easily be able to establish a prima facie case as a result of possessing minimal qualifications. As was recognized by Judge Wilkey in this case:

> [T]he use of an absolute test of qualifications . . . can easily force the burden of rebutting a prima facie case upon an employer who has never come close to making a discriminatory hiring decision. Even an employer who actively favors minority applications could come under the gun, if he just once passed over a marginal minority candidate in favor of a highly qualified nonminority candidate. The potential for a standard to lead to such possible injustice should give us pause.

Pet. for Cert. 39a.[7] See also Pet. for Cert. 37a-38a. Clearly, Title VII was not enacted to invite lawsuits by disgruntled, minimally qualified applicants who were rejected in favor of candidates with superior qualifications.[8]

A minimum qualifications standard, moreover, bears no relationship to how employment decisions are made in the workplace. Employers make hiring and promotion decisions based on an assessment of relative qualifications. Because of the incentives inherent in hiring and promoting the most productive individuals, employers select those who they believe

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[7] *Cf. Olson v. Philco-Ford*, 531 F.2d 474, 478 (10th Cir. 1976) ("To make a prima facie case in a situation such as that before us something more is needed than proof that a qualified male was chosen over a qualified female. If nothing more is needed, we have indeed opened Pandora's box.")

[8] The requirement to show equivalent qualifications does not place an undue burden on the plaintiff. The liberal discovery rules applicable to any civil suit as well as the plaintiff's access to the EEOC's investigatory files concerning the suit, if any (*see EEOC v. Associated Dry Goods Corp.*, 101 Sup. Ct. 817 (1981)), permit the plaintiff to obtain such comparative data prior to having to establish the prima facie case at trial.

to be the best qualified individuals available. A comparison of relative qualifications at the prima case stage reflects the realities of the selection process and is in keeping with the purposes of the *McDonnell Douglas* formula. As was well-stated by Judge Wilkey:

> By a comparative technique one can assess how well one candidate has performed in the past compared to another candidate; compare the performance of organizational units for which the candidates were responsible; compare the subjective evaluations from their supervisors in the past; or perhaps compare their general reputations among those for whom they worked. This type of comparison would bear at least some relationship to employment decisions made in the real world. If a court found that a minority candidate was approximately as qualified as a nonminority candidate in this sense, the finding truly would bear some relation to the likelihood that the employer made his decision based on discriminatory racial grounds.

Pet. for Cert. 34a.

Conversely, as Judge Wilkey also stressed, application of a minimum qualifications standard in a real world context would have the practical effect of forcing employers to accord minority candidates preferential treatment in many instances:

> The consequences are clear for any employer who contemplates promoting a superior nonminority employee over a marginally qualified minority employee: since the minority employee will automatically be able to make out a prima facie case of discrimination, it will make no sense for the employer to promote the superior candi-

> date over the marginal candidate unless he has available sufficient resources of time and money to rebut the prima facie case in extended litigation.

Pet. for Cert. 38a. This effect would be especially pronounced in situations involving managerial positions.

> [T]he difficulty, not to say impossibility, of devising an objective test to identify those who would be best in a managerial position, simply highlights the absurdity of using an absolute, objective test rather than a relative one to determine managerial qualifications under *McDonnell Douglas*.

Id.

To be sure, the employer would have the opportunity, even under the court of appeals' approach, to raise the relative qualifications issue at the rebuttal stage of a Title VII suit, but "as a practical matter of litigation expense. . . . [it] is likely to be significantly more costly" for the employer to defend its selection in that posture. *Id.* Accordingly, we strongly agree with Judge Wilkey's conclusion that:

> To impose this added expense of making an affirmative defense on a defendant, who has not even been shown more likely than not to have discriminated, is neither fair nor consistent with usual trial procedure.

Id.

In sum, resolution of the plaintiff's relative qualifications, therefore, is indispensible in determining whether the plaintiff has established a prima facie case. *See Williams v. Boorstin*, —— F.2d ——, 23 FEP Cases 1669, 1674 (D.C. Cir. 1980). A plaintiff

"must demonstrate that she was as qualified as the promoted person". *Pinckney v. Cty. of Northhampton*, —— F. Supp. ——, 27 FEP Cases 528, 535 (E.D. Pa. 1981), *appeal pending*, No. 81-1887 (3d Cir.). No inference of discrimination is established by a lesser qualified candidate because the likelihood is that an employer will select the applicant with the superior credentials. Title VII "was not intended to diminish traditional management prerogatives," and in any event, "an employer has discretion to choose among equally qualified candidates." *Burdine*, 101 Sup. Ct. at 1097.

CONCLUSION

The decision of the court below is inconsistent with the standards for a prima facie case established by this Court. Moreover, to permit a prima facie case to be shown based on minimum qualifications is not in keeping with its purpose of establishing an inference of discrimination. Finally, such a standard undercuts the purpose of Title VII to assure "efficient and trustworthy workmanship . . . through fair and . . . neutral employment . . . decisions." *McDonnell Douglas*, 411 U.S. at 801. For these reasons, the decision of the court of appeals should be overturned.

Respectfully submitted,

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IN THE

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October Term, 1981

UNITED STATES POSTAL SERVICE
BOARD OF GOVERNORS,

Petitioner,

v.

LOUIS H. AIKENS,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF *AMICI CURIAE* FOR NOW LEGAL DEFENSE AND EDUCATION FUND AND EQUAL RIGHTS ADVOCATES, INC.

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No. 81-1044

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

UNITED STATES POSTAL SERVICE
BOARD OF GOVERNORS, PETITIONER

v.

LOUIS H. AIKENS, RESPONDENT

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF AMICI CURIAE FOR NOW LEGAL DEFENSE AND EDUCATION FUND AND EQUAL RIGHTS ADVOCATES, INC.

The NOW Legal Defense and Education Fund and Equal Rights Advocates, Inc., with the written consents of the parties, which have been filed with the Clerk, respectfully submit this brief as Amici Curiae in support of the Respondent, Louis H. Aikens.

TABLE OF CONTENTS

	Page
Table of authorities.....	ii
Interest of the amici curiae.....	1
Summary of argument.....	3
Argument.....	9
A. Title VII plaintiffs do not have to prove that their qualifications equal or exceed those of others in order to establish a prima facie case of employment discrimination.....	9
B. The evidentiary burdens on Title VII plaintiffs would be significantly increased, and enforcement of Title VII accordingly weakened, were comparative qualifications made an element of the plaintiff's prima facie case...	22
Conclusion.....	34

TABLE OF AUTHORITIES

Page

Cases:

Aikens v. U.S. Postal Service Board of Governors, 665 F.2d 1057 (D.C. Cir. 1981)..... 12

Albemarle Paper Corp. v. Moody, 422 U.S. 405 (1975)..... 33

Alexander v. Gardner-Denver Corp., 415 U.S. 36 (1974).... 30

Board of Trustees of Keene State College v. Sweeney, 439 U.S. 24 (1978)..... 11

Bundy v. Jackson, 641 F.2d 934 (D.C. Cir. 1981)..... 21

Ford Motor Corp. v. EEOC, 50 U.S.L.W. 4937 (June 29, 1982)..... 12,23, 30

Furnco Construction Corp. v. Waters, 438 U.S. 567 (1978).. 11,18

Grant v. Bethlehem Steel Corp., 635 F.2d 1007 (2d Cir. 1980), cert. denied, 452 U.S. 940 (1981)..... 33

Griggs v. Duke Power Corp., 401 U.S. 424 (1971)..... 20

TABLE OF AUTHORITIES (Cont'd.)

	Page
International Brotherhood of Teamsters v. U.S., 431 U.S. 325 (1976).....	6,11, 26,33
Keyes v. Lenoir Rhyne College, 552 F.2d 579 (4th Cir.), cert. denied, 434 U.S. 904 (1977).....	25
Lieberman v. Gant, 630 F.2d 60 (2d Cir. 1980).....	25
McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973)...	passim
Nanty v. Burrows, 660 F.2d 1327 (9th Cir. 1981).....	25
Robbins v. White-Wilson Medical Clinic, Inc., 660 F.2d 1064 (5th Cir. 1981), vacated, 102 S. Ct. 2229 (1982).....	33
Rowe v. General Motors Corp., 457 F.2d 348 (5th Cir. 1972).....	33
Smallwood v. United Airlines, 661 F.2d 303 (4th Cir. 1981).....	25

TABLE OF AUTHORITIES (Cont'd.)

	Page
Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248 (1981).....	11,15, 28
U.S. v. Board of School Comm'rs, 573 F.2d 400 (7th Cir.), cert. denied, 439 U.S. 824 (1978).....	26
U.S. Postal Service Board of Governors v. Aikens, 453 U.S. 902 (1981).....	15
Statutes:	
Title VII, 42 U.S.C. §§ 2000e et seq. (Including the Equal Employment Opportunity Act of 1972, 42 U.S.C. 2000e-16).....	3
Miscellaneous:	
Bartholet, Application of Title VII to Jobs in High Places, 95 Harv. L. Rev. 947 (1982).....	28, 30-31, 33

TABLE OF AUTHORITIES (Cont'd.)

	Page
Hunt and Pazuniak, Special Problems in Litigating Upper Level Employment Discrimination Cases, 4 Del. J. Corp. L. 114 (1978).....	26
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U.S. Bureau of the Census, Statistical Abstract of the United States: 1980 (101 ed.), Wash. D.C. 1980.....	32
1981 (102 ed.), Wash. D.C. 1981.....	16-17, 32
Waintroob, The Developing Law Of Equal Employment Opportunity at the White Collar and Professional Level, 21 Wm. & Mary L. Rev. 45 (1979)....	26

INTEREST OF THE AMICI CURIAE

The NOW Legal Defense and Education Fund ("NOW LDEF") is a non-profit civil rights organization that performs a broad range of legal and educational services nationally in support of women's efforts to eliminate sex-based discrimination and secure equal rights. NOW LDEF was established in 1970 by leaders of the National Organization for Women, a membership organization of over 170,000 men and women in 726 chapters throughout the United States. A major goal of the NOW LDEF is eliminating barriers that deny women economic opportunities. In furtherance of that goal, NOW LDEF has participated in numerous cases to secure full enforcement of laws prohibiting employment discrimination.

Equal Rights Advocates, Inc., is a San Francisco based, public interest legal and educational corporation specializing in the area of sex discrimination. It has a long history of interest, activism and advocacy in all areas of the law which affect equality between the sexes. Equal Rights Advocates, Inc. has been particularly concerned with gender equality in the work force because economic equality is fundamental to women's ability to achieve equality in other aspects of society.

SUMMARY OF ARGUMENT

Petitioner would depart from a line of Supreme Court cases, beginning with McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973), for reasons that contradict both the holdings of those cases and the stated purposes and objectives of Congress as expressed in Title VII, 42 U.S.C. §§ 2000e et seq. The government's analysis reflects an employer's perspective, for it unquestioningly embraces institutional biases which favor the status quo and traditional notions about job requirements which have fostered, and now perpetuate, great imbalance in employment opportunities in this country.

A. McDonnell Douglas and this Court's subsequent opinions stand four-

square for the proposition that a prima facie case of employment discrimination is established with evidence that a qualified individual, a member of a group recognized by Congress as being the object of entrenched and pervasive employment discrimination, applied for a vacant position and that, despite demonstrated qualifications, he or she was rejected and instead a member of a favored group was hired or promoted. Claimants having established that they were "qualified for [the] job," id. at 802, McDonnell Douglas did not further require that they compare and contrast themselves with successful applicants to demonstrate the same or superior qualifications. The Court allocated burdens of

production, and presented a means to analyze the evidence, whereby plaintiffs could develop the case directly from their own sources. Following the clear Congressional mandate that Title VII be effectively implemented, and in keeping with the realities of the situations in which Title VII cases most often arise, the Court insisted that the party who made the job decision, who knew its bases (whether impermissible or permissible), and who was uniquely situated to explain it, be the one to put in issue the relatively equal or superior qualifications of others. McDonnell Douglas considered that burden on the employer to be fully justified in view of the strong, albeit regrettable, inference of unlawful discrimination that arises whenever the qualified minority or female

candidate is rejected in favor of a white or a male.

B. To make the imposition of additional burdens on Title VII plaintiffs seem not unduly harsh, the government argues that discrimination can be established through means other than those specifically enumerated in McDonnell Douglas. Although giving aggrieved individuals the flexibility to utilize other evidence, International Brotherhood of Teamsters v. U.S., 431 U.S. 325, 358 (1976), McDonnell Douglas, by the very way it was structured, expressed this Court's recognition that those opportunities are not frequent. Persons suffering the consequences of discrimination do not often have the resources to commit to the pursuit of that evidence, which, in any event,

can be hard to develop. More importantly, the fact that some persons claiming discrimination would not be prevented from obtaining redress by the government's reformulation of McDonnell Douglas fails to justify the dismissal of legitimate claims by persons unable to develop their cases in those different ways. The essence of Petitioner's response to the plight of those plaintiffs is an expression of concern that the federal government and other employers would face a proliferation of prima facie cases, some of which might lack merit. That argument does not recognize that the prima facie case is merely the first step towards a resolution on the merits; and thus that the employees' ability to meet their threshold burden

would not translate into the commencement of a rash of unmeritorious lawsuits. As it is, relatively few individuals have the resources and tenacity to institute claims against their employers. Moreover, it was the clear intent of Congress and of this Court in McDonnell Douglas that the first priority be to enable legitimate employment discrimination claims to go forward and to provide strong incentives for employers to comply with the law.

ARGUMENT

A. TITLE VII PLAINTIFFS DO NOT HAVE TO PROVE THAT THEIR QUALIFICATIONS EQUAL OR EXCEED THOSE OF OTHERS IN ORDER TO ESTABLISH A PRIMA FACIE CASE OF EMPLOYMENT DISCRIMINATION

1. The premise of McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973), where the Court established a framework in which evidence would be presented and analyzed and burdens appropriately allocated, was that "Title VII makes plain the purpose of Congress to assure equality of employment opportunities and to eliminate those discriminatory practices and devices which have fostered racially stratified job environments to the disadvantage of minority citizens," id. at 800, and that "Title VII tolerates no racial discrimination, subtle or otherwise." Id. at 801. Thus, it was in the context

of implementing that clear and firm Congressional resolve to end employment discrimination that McDonnell Douglas held that an aggrieved plaintiff must at the outset offer evidence sufficient to establish an inference that he or she was not hired or not promoted for unlawful, discriminatory reasons. The Court enumerated certain circumstances which, when proven, would enable plaintiff to establish prima facie the necessary inference of discrimination:

> The complainant in a Title VII trial must carry the initial burden under the statute of establishing a prima facie case of racial discrimination. This may be done by showing (i) that he belongs to a racial minority; (ii) that he applied and was qualified for a job for which the employer was seeking applicants; (iii) that, despite his qualifications, he was rejected; and (iv) that, after his rejection, the position remained open and the employer continued to seek appli-

> cants from persons of complainant's qualifications.

Id. at 802. Plaintiff having made that prima facie case, the defendant-employer must come forward with evidence to explain his employment decision. Id.

Since McDonnell Douglas, this Court has repeatedly and consistently defined the plaintiff's initial burden to be one of "offering evidence adequate to create an inference that an employment decision was based on a discriminatory criterion illegal under the Act." International Brotherhood of Teamsters v. U.S., 431 U.S. 325, 358 (1976). See also, Furnco Construction Corp. v. Waters, 438 U.S. 567, 576 (1978); Board of Trustees of Keene State College v. Sweeney, 439 U.S. 24 (1978); Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248, 254 (1981);

Ford Motor Corp. v. EEOC, 50 U.S.L.W. 4937, 4938 n.7 (June 29, 1982). The Court has never imposed additional burdens on the plaintiff at the threshold stage. More specifically, as the court of appeals below correctly observed, "the Supreme Court has never stated that establishment of a prima facie case must include proof that plaintiff was 'as qualified or more qualified' than the persons hired or promoted." 665 F.2d 1057, 1059 (Pet. App. at 6a).[1] Seeking to reverse the D.C. Circuit's ruling,

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[1] Relying on that correct interpretation of this Court's decisions, the court of appeals below properly applied the law in remanding to the trial court. (Pet. App. at 2a-9a). The district court had held, in its ultimate "Conclusion of Law," "that plaintiff has failed to present a prima facie case of racial discrimination in that plaintiff failed to prove that he was as qualified or more qualified than the individuals who were promoted or detailed."

Petitioner would require that proof in many cases (see infra at 23-27).

2. McDonnell Douglas recognizes that evidence of discrimination is difficult to ascertain since employers have complete control over whatever reasons, legitimate or illegitimate, explain their employment decisions. McDonnell Douglas recognizes further that direct evidence of discrimination will rarely be available and is often "subtle." Id. at 801. The four prong test allows complaining parties to establish a prima facie case without resort to information sources not readily available to them. Given the inherent imbalance in the availability of information regarding employment practices and specific employment decisions, the importance of that feature of the McDonnell Douglas test cannot be minimized. While

plaintiffs are fully equipped to prove their own qualifications with whatever detail is required by the job criteria, the same cannot be said of their ability to prove the qualifications of others. Information about such other personnel and the considerations that influenced the employers' decisions, whether proper or improper, are uniquely within the employers' control.

As Justice Marshall said, in dissenting from the initial remand in this case:

> An applicant who has satisfied the objective qualifications established by the employer for promotion may have no way of knowing what additional considerations the employer relied on in selecting a particular person among the pool of qualified applicants. This information is uniquely within the control of the employer, and thus it places an unfair burden on the plaintiff to require him, as part of his prima facie case, to guess what additional

> considerations the employer might have relied on and to prove that even under these considerations he was at least as qualified as the selected applicant.

453 U.S. 902, 905-6 n.2 (1981) (Pet. App. at 14a n.2). Under the McDonnell Douglas formulation, then, only if defendant challenges plaintiff's proven qualifications for the job in its proffered nondiscriminatory reason for favoring another, thereby focusing the inquiry, might the plaintiff have to prove the employer's evaluative judgment a cover or pretext for unlawful discrimination. Burdine, 450 U.S. at 252-53.

3. As its explanation of purpose makes apparent, this Court in McDonnell Douglas, unlike the government, did not consider the prevalence of discrimination in our nation irrelevant to whether a prima facie inference can be drawn when

a man or a white with unproven qualifications is given precedence over a qualified woman or a black in an important employment decision. Only to one wearing blinders might it appear that the promotion of a white over a qualified black is an "isolated" decision not meriting closer scrutiny. It is an unfortunate fact of life in this country that, due to pervasive and entrenched discrimination, qualified individuals are denied jobs because of their race, sex, religion or national origin. That state of affairs permeates our business and social life, and is demonstrable on all levels.[2] In

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[2] Both the wage differential between men and women, whites and blacks, and the pervasive pattern of occupational segregation establish the existence of barriers to employment advancement for women and minorities. In 1980, white men had median weekly earnings of $329.

[Footnote continues]

view of the unambiguous evidence of discrimination still rampant within federal government employment practices, it is disquieting to read that Petitioner is "not convinced that discrimination is so

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[Footnote continued]

As a group, women earned $204, and blacks earned $219. In that year, women earned about 62% of white male wages, and blacks earned about 66%. U.S. Bureau of the Census, Statistical Abstract of the United States: 1981 (102 ed.), Wash. D.C. 1981, Table 681 (hereinafter "Statistical Abstract"). The imbalance in earning power is even more striking at higher income levels. In 1979, 15.3% of white men, as compared to 1.3% of white women, 3.9% of minority men, and 0.7% of minority women, received annual incomes above $25,000. Id. at Table 742. The pattern of occupational segregation illustrates that women and minorities are confined to low-paying, low-status jobs. In 1980, 80.1% of all clerical workers were female. More than 97.5% of all household workers were women, and 33.2% were black. On the other hand, almost three times as many managerial positions were occupied by men as by women. Even these figures do not adequately portray the disproportion of men in managerial and supervisory jobs because they include the relatively low-status occupation of office managers, which is almost two-thirds female. Id. at Table 675.

prevalent that 'experience has proved that in the absence of any other explanation it is more likely than not that' the choice of a qualified white man over an equally or less qualified black is 'bottomed on impermissible considerations.'" (Pet. Br. at 18-19) (quoting Furnco, 438 U.S. at 580). In marked contrast, Congress willingly inferred discrimination from a pattern so widespread as to exceed coincidence, and accordingly enacted Title VII and its potent mechanisms of enforcement.

4. Petitioner and both supporting amici concede repeatedly that the failure to promote individuals "as qualified" as those individuals who received promotions is sufficiently strong evidence of discrimination to satisfy the McDonnell Douglas test and require an employer's

explanation.[3] In drawing an inference of discrimination, it would take a subtle mind indeed to differentiate between a showing that the aggrieved plaintiff was "as qualified" (or "at least equal") and a showing that he or she was "qualified for the job," McDonnell Douglas at 802 (or has, in the words of the court of appeals below, "whatever qualifications or background experience the employer has indicated are important"). (Pet. App. at 8a).[4]

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[3] "Such a presumption ['that the employer unlawfully discriminated against the employee'] can be created only if the employee shows that his qualifications are at least equal to those of the person selected. . . ." (Petition for a Writ of Certiorari at 7; see also id. at 11 n.7); see also, (Brief Amicus Curiae for the EEAC at 8-9); (Brief for the AFL-CIO as Amicus Curiae at 6).

[4] This Court has recognized that some "qualifications" indicated by employers can operate

[Footnote continues]

Being "qualified" closely approximates, in most employment settings, being "as qualified" as other candidates. It is naive of the government and its amici to see a critical difference, from the standpoint of employer decision-making as it works in the real world, between a pool of qualified individuals and a pool of individuals each "as qualified" as the next. While each person is bound to have certain specific strengths and weaknesses relative to others, all would bring roughly equivalent qualifications to the job; all have "similar qualifica-

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[Footnote continued]

as "built-in headwinds," Griggs v. Duke Power Co., 401 U.S. 424, 432 (1971), adversely affecting the employment opportunities for minorities and women. No such claim of disparate impact has been made in this case, which was tried on a disparate treatment theory.

tions." Bundy v. Jackson, 641 F.2d 934, 951 (D.C. Cir. 1981) (quoted and discussed in Pet. Br. at 14 n. 9).

Despite the arguments in Petitioner's brief, it must be noted that the question presented in this case does not directly address whether a sufficiently strong inference of discrimination can be drawn when a choice is made between two equally qualified candidates, one white and one black, or one male and one female. Although the government's argument dwells on that situation, the question it actually puts to this Court is whether an inference can be drawn when the black or female is qualified and the white or male, who got the disputed job, may or may not be. The Question Presented simply makes no representations or assumptions regarding the qualifications of the "non-minority" ap-

plicant. Apparently, in the attempt to strengthen its argument for major change in the operation of the anti-discrimination laws, the government would have the Court assume that a white man's qualifications are equal to those of others; but when persons traditionally and today the object of pervasive unlawful discrimination claim that their qualifications are equal for purposes of making the prima facie case, the government insists that they prove them.

B. THE EVIDENTIARY BURDENS ON TITLE VII PLAINTIFFS WOULD BE SIGNIFICANTLY INCREASED, AND ENFORCEMENT OF TITLE VII ACCORDINGLY WEAKENED, WERE COMPARATIVE QUALIFICATIONS MADE AN ELEMENT OF THE PLAINTIFF'S PRIMA FACIE CASE

Although acknowledging that the ultimate burden of persuasion at all times remains on the Title VII plaintiff, Peti-

tioner asks this Court to reallocate radically the intermediate burdens of production by making it much more difficult for plaintiffs to get beyond the threshold stage and require employers to justify their employment decisions. The primary results of the government's proposed change in the law would be to defeat meritorious cases and concomitantly weaken the prophylactic functions served by Title VII. See Ford Motor, 50 U.S.L.W. at 4939.

1. Petitioner places considerable stress on means, other than the McDonnell Douglas formulation, by which a Title VII plaintiff can raise the requisite inference of discrimination to make out a prima facie disparate treatment case. See (Pet. Br. at 22-25). Yet the fact that some Title VII plaintiffs will enjoy the good

fortune of having evidence of discrimination beyond that specifically described in McDonnell Douglas does not address the more common situation where aggrieved employees do not have similar access to such clear evidence.

It is evident from the way in which McDonnell Douglas itself is structured, with the other possible means of establishing prima facie cases referenced in a footnote, that this Court rejected, as wishful thinking, the government's assertion that "a plaintiff who has in fact been discriminated against is likely to have many other ways of establishing a prima facie case." (Pet. Br. at 9). That assumes a deep pocket and staying power to engage in massive discovery and trial preparation which may typify the culpable

employer, but not the disappointed employee.[5] It further assumes that, with enough digging, other evidence will surface and that when it does, courts will give it substantial weight. Experience in Title VII litigation, however, is to the contrary. Statistical information is often difficult to compile, especially when the discrimination charge concerns positions that are relatively few in

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[5] Moreover, even if plaintiffs had resources to engage the employers in protracted litigation, pretrial discovery is not reliable, in part because courts are reluctant to permit inquiry into other employees' qualifications, Lieberman v. Gant, 630 F.2d 60, 67-68 (2d Cir. 1980); Keyes v. Lenoir Rhyne College, 552 F.2d 579, 581 (4th Cir.), cert. denied, 434 U.S. 904 (1977); and in part because of difficulties in pinning employers down prior to trial. Smallwood v. United Airlines, 661 F.2d 303, 306 (4th Cir. 1981); Nanty v. Burrows, 660 F.2d 1327 (9th Cir. 1981).

number.[6] Moreover, as the sophistication of personnel responsible for employment increases, it becomes all the more unlikely that so-called "anecdotal evidence" of discrimination will surface. U.S. v. Board of School Comm'rs, 573 F.2d 400, 412 (7th Cir.), cert. denied, 439 U.S. 824 (1978). What does surface may be discredited or given minimal weight, even for purposes of making a prima facie case. Evidence found in pre-Title VII discriminatory conduct - at a time when employers were more blatant - is becoming increas-

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[6] This Court has cautioned "that statistics are not irrefutable; they come in infinite variety and, like any other kind of evidence, they may be rebutted." Teamsters, 431 U.S. at 340-41 n.20. See generally, Hunt and Pazuniak, Special Problems in Litigating Upper Level Employment Discrimination Cases, 4 Del. J. Corp. L. 114, 145-51 (1978); Waintroob, The Developing Law of Equal Employment Opportunity at the White Collar and Professional Level, 46 Wm. & Mary L. Rev. 45, 86-103 (1979).

ingly hard to develop simply due to the passage of time.

2. The government's insistence that, unless plaintiffs are required to show comparative qualifications, prima facie cases will be created each time an employer selects from a heterogeneous group of qualified job applicants (Pet. Br. at 15), takes no account of the realities of the situation to which the argument is applied; the argument is merely a hypothetical. Prima facie cases do not win Title VII cases; they merely trigger the next step and the minimal burden upon the employer to explain his employment decision. The government presents no empirical evidence, from the experience in the D.C. Circuit or elsewhere, that the current allocation of burdens of production, as formulated

in McDonnell Douglas, has imposed undue hardships on employers or the courts.[7] Although Petitioner suggests to the contrary (see Pet. Br. at 15-17), prima facie cases do not affect the employer's "discretion to choose among equally qualified candidates, provided the decision is not based on unlawful criteria." Burdine, 450 U.S. at 259.

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[7] Petitioner attempts to support this point by citing to Bartholet, Application of Title VII to Jobs in High Places, 95 Harv. L. Rev. 947 (1982). See, (Pet. Br. at 32-33 n. 22). Professor Bartholet's concern, however, is with difficulties facing employees in prosecuting their claims. After a thorough analysis of Title VII enforcement, Professor Bartholet concludes that the courts must in "disparate treatment" cases begin to scrutinize employers' proffered explanations for their employment decisions (especially when that explanation relies on subjective, comparative qualifications) in a manner similar to the job-relatedness inquiry already applied in disparate impact cases. Id. at 1026.

A prima facie victory would be hollow if the burden of persuasion were not carried thereafter. Common sense demands the conclusion that few suits would be filed merely to burden the employer but ultimately to get nowhere on the merits. One can safely assume that few employees would commit their limited resources and create further tensions with their employers unless they had good reason to believe that favorable results could be achieved. It is the claimant who suffers most in lengthy Title VII litigation: "Court delays, of course, affect all litigants. But for the victim of job discrimination delay is especially unfortunate. The claimant cannot afford to stand aside while the wheels of justice grind slowly toward the ultimate resolution of the lawsuit. . . . [T]he victims of job

discrimination want jobs, not lawsuits." Ford Motor, 50 U.S.L.W. at 4937, 4940. Indeed, since "'the preferred means for achieving' the goal [of ending employment discrimination] is through cooperation and voluntary compliance,'" Ford Motor, 50 U.S.L.W. at 4939 (quoting Alexander v. Gardner-Denver Co., 415 U.S. 36, 44 (1974)), the elimination of valid prima facie cases would no doubt significantly reduce incentives on employers to comply with the law before the fact of litigation. The prospect of having to explain or justify employment practices necessarily builds constructive pressure to reexamine suspect criteria and procedures and to institute changes that would withstand close examination under Title VII. See, Bartholet, Application of Title VII

to Jobs in High Places, 95 Harv. L. Rev. 947, 954 (1982).

In considering the implications of requiring proof of relative qualifications at the prima facie stage it is significant that the impact of the government's proposed departure from McDonnell Douglas would be felt most severely by litigants seeking proper redress at the managerial and professional level,[8] which is the area of America's economy where Title VII enforcement has fallen farthest short of achieving the Congres-

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[8] By the terms of the Act, and by its legislative history, Title VII draws no distinction whatsoever based on employment status. Congress specifically recognized in passing the 1972 amendments that employees in "the higher-paying and more prestigious positions" must be given "the same opportunity to redress their grievances as are available to other employees in other sectors of business." S. Rep. No. 415, 92 Cong. 1st Sess. 12 (1971).

sional purpose of ending discrimination.[9] The government acknowledges that problems abound in defining qualifications at the managerial and professional level (Pet. Br. at 13 n.8) and that employer decision-making is often, for better or worse, affected by "impressions" and other highly subjective, potentially pretextual, fac-

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[9] The federal labor force statistics dramatically illustrate the point. As of 1978, white men occupied more than 90% of the top positions, Grades 16-18, supervising a work force that was significantly female and non-white. Men were not mired in low-level positions; they occupied a quarter of all jobs at Grades 1-6, but held more than 90% of all positions at Grades 13 and above. Fewer than 10% of the men above Grade 12 were minority men, so white men once again emerge at the top of the employment schedule, wholly disproportionate to their representation at lower levels. Statistical Abstract: 1981, Table 462; Statistical Abstract: 1980, (101 ed.), Table 477.

tors (Pet. Br. at 33).[10] However, the fact that discrimination often takes subtle form does not argue for further burdening its victims. Rather, it mandates that employers explain their decisions in response to prima facie cases established under the McDonnell Douglas criteria.

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10 It cannot be gainsaid that subjective value judgments are used, whether or not with malicious intent, to foster and perpetuate employment discrimination. The discriminatory effect of institutional biases within facially neutral employment-related systems, and the human tendency to exclude outsiders and to apply unspoken and even unrecognized biases in evaluating such persons, were specific concerns of Congress in amending the 1964 Civil Rights Act to accord with reality. See, Teamsters, 431 U.S. at 391 n.21, 392-93; Bartholet, supra at 982. The potential for discrimination that is lodged in subjective job criteria has been widely recognized. Robbins v. White-Nelson Medical Clinic, Inc., 660 F.2d 1064, 1068 (5th Cir. 1981), vacated on other grounds, 102 S. Ct. 2229 (1982); Albemarle Paper Corp. v. Moody, 442 U.S. 405, 433 (1975); Grant v. Bethlehem Steel Corp., 635 F.2d 1007 (2d Cir. 1980), cert. denied, 452 U.S. 940 (1981); Rowe v. General Motors Corp., 457 F.2d 348 (5th Cir. 1972).

CONCLUSION

For the reasons set forth above, this Court should affirm the judgment of the Court of Appeals for the District of Columbia.

Respectfully submitted,

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[11] Attorneys for amici gratefully acknowledge the assistance of Naomi Cahn, Susan W. Coleman and William M. Blier in the preparation of this brief.

No. 81-1044

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1981

UNITED STATES POSTAL SERVICE,
Petitioner,

v.

LOUIS H. AIKENS,
Respondent.

CERTIFICATE OF SERVICE

I hereby certify that I am a member of the Bar of this Court and that I served this brief amici curiae upon petitioner and respondent pursuant to Supreme Court Rule 28 by placing a copy in the United States mail with first class postage prepaid, addressed to:

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Done this 6th day of August, 1982.

S/
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Amicus Brief

5

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BRIEF AMICUS CURIAE OF THE CHAMBER OF COMMERCE OF THE UNITED STATES

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MOTION OF THE CHAMBER OF COMMERCE OF THE UNITED STATES TO FILE A BRIEF AMICUS CURIAE

The Chamber of Commerce of the United States ("Chamber"), pursuant to Rule 36.1 of the Rules of this Court, hereby moves for leave to file the attached brief *amicus curiae* in support of the Petitioner, United States Postal Service,[1] and in support of its motion states as follows:

1. The Chamber is the largest federation of business organizations in the United States. At present, the Chamber has in excess of 240,000 members, including over 235,000 corporations, partnerships, proprietorships and individuals, as well as 1,350 trade associations, and 2,800 local and state chambers of commerce.

[1] This motion is necessitated by the failure of the Respondent to respond to the Chamber's written request for consent; the Petitioner has give its consent.

2. The Chamber regularly presents its views to this Court and the lower federal courts on issues of broad importance to its members, particularly in the labor relations field.[2] As a principle spokesman for private business, the Chamber can present a viewpoint not presented by the parties to this litigation.

3. The decision below in the instant case, if affirmed by this Court, would have a tremendous impact on the Chamber's members subject to Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, *et seq.*[3] The decision of the U.S. Court of Appeals for the District of Columbia Circuit, allows plaintiffs in discrimination cases to establish a *prima facie* case by merely establishing that they are a member of a protected class, that they meet the *minimum* qualifications for the position, and that they were not hired for, or promoted to, that position. Thus, according to the D.C. Circuit, there is a presumption of discrimination anytime a member of a protected class is denied a job, and that person meets the minimum qualifications for the position. It does not matter that the person ultimately hired is far better qualified than the member of the protected class who was rejected.[4]

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[2] *See, e.g. First National Maintenance Corp.* v. *NLRB*, ____ U.S. ____, 69 L.Ed.2d 318 (1981); *Northwest Airlines, Inc.* v. *Transport Workers of America, AFL-CIO, et al.*, ____ U.S. ____, 67 L.Ed.2d 750 (1981) (Pet. for cert. only); *Industrial Union Department, AFL-CIO* v. *American Petroleum Institute*, 448 U.S. 607 (1980); *Christianburg Garment Co.* v. *EEOC*, 434 U.S. 412 (1978); *Gould Corp.* v. *NLRB*, 612 F.2d 728 (3rd Cir. 1979).

[3] Pursuant to 42 U.S.C. § 2000e-(b), Title VII is applicable to all private employers with 15 or more employees in each of 20 or more weeks per year. Because courts interpreting the Age Discrimination in Employment Act and the agencies enforcing state equal employment laws often follow the burdens of proof established by this Court in federal cases, the impact of the decision here will extend far beyond the reach of Title VII.

[4] It is significant that in the instant case there was no evidence sufficient to show that respondent "was rejected under circumstances which give rise to an inference of unlawful discrimination." *Texas Department of Community Affairs* v. *Burdine*, 450 U.S. 248 at 253 (1981) (footnote omitted). To the contrary, the trial court found that "almost all the high level positions [in respondent's place of employment] are held by blacks," Appendix H, at 53a, and that plaintiff had "produced no evidence of specific acts of discrimination against him." *Id* at 54a.

The obvious effect of such a holding is to encourage a virtual explosion in the number of discrimination suits to which the Chamber's members will be subjected. It is well documented that over the last decade, employers have already been subjected to a tremendous increase in employment discrimination suits. In the 1981 Annual Report of the Director of the Administrative Office of the United States Courts, it states (at p. 75):

> Civil rights cases (excluding prisoner petition civil rights) regularly comprise a significant portion of civil litigation filed in the district courts; 1981 was no exception. * * * The largest increases in civil rights litigation were in employment discrimination suits . . . which rose 24.5 . . . percent . . . .

Moreover, an examination of the number of actions filed pursuant to Title VII over an eight year period shows an increase from 1,787 actions filed in 1973 to 6,245 filed in 1981,[5] an increase of 350 percent! 1981 Annual Report at 76.

Affirmance of the D.C. Circuit's opinion which significantly reduces the burden of proof necessary to establish a *prima facie* case will increase these figures even more dramatically.[6]

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[5] The calculations are for a 12 month period ending June 30 of each year.

[6] It is not sufficient to argue that employers can ultimately rebut the *prima facie* case. For as a practical matter, the tremendous costs of litigation force many employers, particularly the small ones that make up a majority of the Chamber's members, to settle the cases prior to trial.

For these reasons, the Chamber respectfully requests that its motion for leave to file a brief *amicus curiae* in support of the Petitioner be granted.

Respectfully submitted,

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June 4, 1982

TABLE OF CONTENTS

	Page
STATEMENT OF INTEREST	1
ARGUMENT	
I. The Decision of the Court Below Misconstrues the Teaching of *McDonnell Douglas Corp.* v. *Green* and Its Progeny	1
II. Title VII Requires Equal Employment Opportunity, Not Affirmative Action	6
CONCLUSION	8

TABLE OF AUTHORITIES

	Page
CASES	
Aikens v. *United States Postal Service*, 642 F.2d 514 (D.C. Cir. 1980)	3
Burdine v. *Texas Department of Community Affairs*, 608 F.2d 563 (5th Cir. 1979)	5
Furnco Construction Corp. v. *Waters*, 438 U.S. 567 (1978)	2
Hagans v. *Adams*, 651 F.2d 622 (9th Cir. 1981)	4
International Brotherhood of Teamsters v. *United States*, 431 U.S. 324 (1977)	2
J. Ste. Marie v. *Eastern Railroad Association*, (2nd Cir. 1981)	6
McDonnell Douglas Corp. v. *Green*, 411 U.S. 792 (1973)	1,2,4
Olson v. *Philco Ford*, 531 F.2d 474 (10th Cir. 1976)	5
Texas Department of Community Affairs v. *Burdine*, 450 U.S. 248 (1981)	1,2,4, 6
White v. *City of San Diego*, 605 F.2d 455 (9th Cir. 1979)	2
Williams v. *Hoffmeister*, 520 F.Supp. 521 (E.D. Tenn. 1981)	6
STATUTES	
Title VII, Civil Rights Act of 1964, 42 U.S.C. § 2000e, et seq	*passim*
MISCELLANEOUS	
Annual Report of the Director, 1981, Administrative Office of the United States Courts	7
Federal Rules of Civil Procedure 52(a)	3

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BRIEF AMICUS CURIAE OF THE CHAMBER OF COMMERCE OF THE UNITED STATES

STATEMENT OF INTEREST

The Chamber of Commerce of the United States ("Chamber") respectfully refers the Court to its statement in support of its motion for leave to file this brief.

I. THE DECISION OF THE COURT BELOW MISCONSTRUES THE TEACHING OF *McDONNELL DOUGLAS CORP.* v. *GREEN* AND ITS PROGENY.

Last term this Court decided *Texas Department of Community Affairs* v. *Burdine*, 450 U.S. 248 (1981). *Burdine* represents another refinement of the test for establishing a *prima facie* case of discrimination, which was first announced in *McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792 (1973).[1] This test has since become black letter law.

[1] The *McDonnell Douglas Corp.* test posits that in order to prove a *prima facie* case of discriminatory treatment the plaintiff must show that "(i) he belongs to a racial minority; (ii) that he applied and was qualified for a job for which the employer was seeking qualified applicants; (iii) that, despite his qualifications, he was rejected; and (iv) that after his rejection, the position remained open and the employer continued to seek applicants from persons of complainant's qualifications." 411 U.S. 792, 802 (1973).

What the *McDonnell Douglas* test means, as explained in *Burdine*, is that, at the initial stage of the tripartite trial,[2] the plaintiff in a Title VII case has the burden of creating a legally mandatory presumption that the defendant illegally discriminated against the plaintiff. 450 U.S. at 254, text and note 7. "The burden of establishing a *prima facie* case of disparate treatment is not onerous. The plaintiff must prove by a preponderance of the evidence that [he] applied for an available position for which [he] was qualified, but was *rejected under circumstances that give rise to an inference of unlawful discrimination.*" (emphasis added) 450 U.S. at 253.[3]

What we had thought had been crystal clear since *McDonnell Douglas Corp.*, and is more compelling after *Burdine*, is that the mere rejection of a member of a protected class, even one who is indisputably qualified for the position he seeks, is not sufficient to create a *prima facie* case of discrimination. Rather, the decision must permit the inference that the rejection was "motivated by discriminatory animus." 450 U.S. at 257. The *McDonnell Douglas* test is a flexible one, and will vary according to the facts of the individual case. *McDonnell Douglas Corp.* v. *Green*, 411 U.S. at 802, n.13; *Furnco Construction Corp.* v. *Waters*, 438 U.S. 567, 575-6 (1978); *International Brotherhood of Teamsters* v. *United States*, 431 U.S. 324, 358 (1977).

The proper application of this test illustrates that the United States Court of Appeals for the D.C. Circuit totally missed the mark when it reversed the District Court's finding

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[2] Assuming the plaintiff satisfies his initial burden the defendant must then "*articulate* some legitimate, nondiscriminatory reason" for his rejection; the plaintiff is then obligated to *prove* that the "reasons offered by the defendant were not its true reasons, but were a pretext for discrimination." *Burdine*, 450 U.S. at 253 (emphasis added).

[3] This Court, as well as lower courts, has described a *prima facie* case in different, but similar language. For example, in *International Brotherhood of Teamsters* v. *United States*, this Court described a *prima facie* case as one which "create[s] an inference that an employment decision was based on a discriminatory criterion illegal under the Act." 431 U.S. 324, 358 (1977). The United States Court of Appeals for the Ninth Circuit has likewise stated that "a *prima facie* case identifies [race] as the likely reason for the denial of a job opportunity." *White* v. *City of San Diego*, 605 F.2d 455, 458 (1979).

that the plaintiff in this case was required to proffer, at the initial stage of his Title VII trial, evidence of his superior qualifications over the persons selected. What the Circuit Court should have been concerned with was the question of whether it was clearly erroneous[4] for the District Court to have found that, based on the evidence presented by the plaintiff, he failed to create the presumption that the defendant Postal Service's failure to promote him was racially motivated.

The Chamber submits that the District Court correctly found that the record before it did not give rise to such a presumption. The record[5] before the District Court reflected that the plaintiff was a highly educated, long time employee of the postal service, with an exemplary work record. *Aikens* v. *United States Postal Service* 642 F.2d 514, 518 (D.C. Cir. 1980). Between February 17, 1973 and January 12, 1974, he applied for, and was denied promotion to the four positions which are the subject of this action. Petition for Writ of Certiorari, p.3. Between 1966 and 1974, plaintiff had been offered, but refused several lateral transfers which would have broadened his experience, as well as several promotions. *Ibid.* "[D]uring the period in question, blacks as well as whites were promoted or detailed to positions above plaintiff's position, there [was] a considerable increase in the number of high level black employees in the D.C. Post Office. . ., and. . . almost all high level positions [were] held by blacks." *Aikens* v. *U.S. Postal Service*, 642 F.2d. at 525 (Wilkey dissenting, quoting findings of district court). Indeed, in January 1974, a black man was chosen as the Postmaster, the highest ranking official in the area. *Aikens* v. *United States Postal Service*, 642 F.2d. at 517, note 2. Plaintiff himself was the "fifth highest ranking employee in the District of Columbia Post Office in March 1973 . . ." Petition for cert. at 3.

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[4] The standard for reversal of the district court in the D.C. Circuit is the "clearly erroneous" rule. Fed. R. Civ. P. 52(a).

[5] The Chamber incorporates by reference the facts as stated in the Petition for Writ of Certiorari.

The *most* that can be said for the record before the district court is that plaintiff was a qualified applicant for positions for which he was not chosen. Having said this, it simply cannot be concluded that he met the task assigned to plaintiffs that he "demonstrate that similarly situated employees were not treated equally." *Texas Dept. of Community Affairs* v. *Burdine,* 450 U.S. at 258, *citing McDonnell Douglas Corp.* v. *Green,* 411 U.S. at 804. More importantly, it cannot be concluded that the Postal Service's failure to promote plaintiff was even remotely attributable to his race. Under the facts of this case, then, it was encumbent upon plaintiff to proffer additional evidence that could give rise to an inference of discrimination, such as evidence of his superior qualifications over the selectees.

The correctness of this approach is best demonstrated when the facts which were before the district court are juxtaposed against the facts in similar cases. In *Hagans* v. *Andrus,* for example, a female employee brought suit alleging sex discrimination after she was denied promotion to a supervisory position. The district court dismissed after the presentation of the plaintiff's case, holding that she had failed to establish a *prima facie* case of discrimination; the Ninth Circuit reversed and remanded. 651 F.2d 622, 624 (1981), rehearing and rehearing *en banc* denied (1981), *cert. denied* ____ U.S. ____, 102 S.Ct. 313 (1981).

In *Hagans,* the plaintiff had introduced evidence that a male co-worker had voiced negative feelings about women in the workplace, that the selecting official was aware of his attitude, and had failed to reprimand him for making such statements. 651 F.2d at 623. Moreover, the selecting official had testified that he "belie[ved that the male co-worker] would feel uncomfortable working with a woman supervisor." 651 F.2d at 626-7. Even based on this evidence, the Ninth Circuit did not hold that a *prima facie* case had been presented. The Ninth Circuit merely reversed the district court's finding that there was "absolutely no hint of sexual discrimination," and

remanded the case to the trial court for further consideration. *Ibid.*[6]

The facts of the case *sub judice* are analogous, but not identical, to those in *Olson* v. *Philco Ford*, 531 F.2d 474 (10th Cir. 1976). In that case a female employee sought a promotion, which was awarded to one of three males who also sought it. The record showed that she and the selectee "started to work at the same time and received salary increases at the same times. They had the same collegiate degrees." 531 F.2d at 477.

The Court discounted the plaintiff's arguments that discrimination "could be inferred from the lack of posting of the position, the failure to provide a formal interview, and the selection of [the male applicant] by two men, one of whom would have been her supervisor if she had been selected." *Ibid.* The Tenth Circuit affirmed the dismissal of this case, noting, "[a]s the case is presented to us, the controlling issue is whether the selection of a qualified man over a qualified woman, standing alone, makes out a *prima facie* case of discrimination." 531 F.2d at 478. The Court answered the question thusly: "We do not believe that . . . in every instance when a qualified man and a qualified woman compete for a single opening, the selection of one over the other makes out a *prima facie* case." *Ibid.*

The Chamber respectfully submits that this conclusion is the correct application of the *McDonnell Douglas* test, as discussed above. Additionally, it is consistent with the spirit and intent of Title VII, as we shall explain below.

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[6] The facts of the *Burdine* case itself provide a useful contrast. The plaintiff in *Burdine* was a female employee who applied for, and was denied promotion to the positions of Project Coordinator and Project Director on a manpower training program. *Burdine* v. *Texas Dept. of Community Affairs*, 608 F.2d 563, 565 (5th Cir. 1979) *reversed and remanded*, 450 U.S. 248 (1981). Prior to seeking the promotion the plaintiff had performed many of the duties of the position for a period of six months. *Ibid.* Not only this, but she had supervised the person who ultimately became Project Coordinator. *Ibid.*

II. TITLE VII REQUIRES EQUAL EMPLOYMENT OPPORTUNITY, NOT AFFIRMATIVE ACTION.

The interpretation given Title VII by the D.C. Circuit would subvert the purposes of Title VII; amending it from an "equal opportunity" statute to an "affirmative action" statute. This was not intended by Congress, as this Court has repeatedly emphasized. In the *Burdine* decision, Justice Powell wrote:

> The court's procedural rule harbors a substantive error. Title VII prohibits all discrimination in employment based upon race, sex, and national origin. "The broad, overriding interest, shared by employer, employee, and consumer, is efficient and trustworthy workmanship assured through *fair and . . . neutral employment and personnel decision.*" McDonnell Douglas, supra, at 801, 36 L. Ed. 2d 668, 93 S. Ct. 1817. *Title VII, however, does not demand that an employer give preferential treatment to minorities or women.* 42 U.S.C. §2000e-2(j) [42 USCS §2000e-2(j)]. See Steelworkers v. Weber, 443 U.S. 193, 205-206, 61 L.Ed.2d 480, 99 S.Ct. 2721 (1979). *The statute was not intended to "diminish traditional management prerogatives." Id.*, at 207, 61 L.Ed.2d 480, 99 S.Ct. 2721. It *does not require the employer to restructure his employment practices to maximize the number of minorities and women hired.* Furnco Construction Corp. v. Waters, 438 U.S. 567, 577-578, 57 L.Ed.2d 957, 98 S.Ct. 2943 (1978).

450 U.S. at 259 (emphasis added).

As stated by the Second Circuit in its recent decision in *J. Ste. Marie* v. *Eastern Railroad Association*, " [t]he employer is not required to hire or promote a minority employee; rather he is forbidden to refuse to hire or promote such an employee because of race." 650 F.2d 395, 399 (1981); *see also, Williams* v. *Hoffmeister*, 520 F.Supp. 521, 535 (E.D. Tenn. 1981).

The effect of the D.C. Circuit's decision is that whenever there are competing minority and non-minority candidates for a position, failure to select the minority candidate results in a

prima facie case of discrimination. This decision invites the filing of a lawsuit each time a personnel decision is made that involves candidates from different protected classes (*e.g.* women, racial minorities, persons of different nationalities).

Quite aside from the fact that it is anathema to the meaning of Title VII, the decision "opens Pandora's box" to a proliferation of ill-founded Title VII lawsuits. As we noted in our Motion for leave to file this brief, there has been a 350 percent increase in the number of cases filed pursuant to Title VII over the last eight years. See "Annual Report of the Director, 1981," published by the Administrative Office of the United States Courts, pp. 75-76. "Civil Rights cases" regularly comprise a significant portion of civil litigation filed in the district courts . . . *Ibid.* And the largest increase in civil rights litigation over the last year was in employment discrimination suits. *Ibid.* This tremendous growth in litigation not only burdens the courts, it is a tremendous burden to employers who must defend against the suits, or spend significant sums of money to settle them. We can ill-afford a rule which by significantly changing the burden of proof necessary to establish a *prima facie* case, will encourage further growth in the number of cases filed.

CONCLUSION

For all of the reasons discussed herein, the Chamber urges the Court to reverse the decision of the court below.

Respectfully submitted,

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June 4, 1982

Docket Sheet

NO. 81-1044-CFX	TITLE United States Postal Service Board of Governors, Petitioner v. Louis H. Aikens

DOCKETED	COURT
Dec. 4, 1981	United States Court of Appeals for the District of Columbia Circuit

DATE	PROCEEDINGS AND ORDERS
	Counsel for Petitioner: Solicitor General
	Counsel for Respondent: L. Harold Aikens, Jr.
Dec. 4, 1981	Petition for writ of certiorari filed. (Record filed).
Jan. 13, 1982	DISTRIBUTED. 2-19.
Jan. 29, 1982	Response requested.
Mar. 1, 1982	Brief for the respondent in opposition filed.
March 3, 1982	DISTRIBUTED. 3-19.
March 22, 1982	Petition GRANTED.

May 5, 1982	Brief, amicus curiae, for The Equal Employment Advisory Council in support of petition filed.
May 6, 1982	Order extending time to file the joint appendix and petitioner's brief on the merits until June 5, 1982.
June 4, 1982	Brief, amicus curiae, of The Chamber of Commerce of the United States filed.
June 4, 1982	Joint appendix filed.
June 8, 1982	Motion of American Federation of Labor and Congress of Industrial Organizations for leave to file a brief as amicus curiae filed.
June 10, 1982	Brief for the petitioner filed.
June 21, 1982	The motion of American Federation of Labor and Congress of Industrial Organizations for leave to file a brief as amicus curiae is GRANTED.
June 29, 1982	Order extending time to file the respondent's brief on the merits until Aug. 6, 1982.
Aug. 9, 1982	Brief, amici curiae, of The American Civil Liberties Union, et al. filed.
Aug. 9, 1982	Brief, amici curiae, for Now Legal Defesne and Education Fund, et al. filed.
Aug. 11, 1982	Brief for the respondent filed.
Aug. 10, 1982	Order further extending time to file the respondent's brief on the merits until Aug. 9, 1982.
Sept. 3, 1982	CIRCULATED.
Nov. 9, 1982	ARGUED.